IN THE

Supreme Court of the United States

No. 674

October Term, 1928

HARRY J. KIRK ET AL.,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division

BRIEF ON BEHALF OF APPELLANTS

GILBERT BETTMAN, Columbus, Ohio,
Attorney General of Ohio,
L. F. LAYLIN, Columbus, Ohio,
JOSEPH A. GODOWN, Columbus, Ohio,
Solicitors for Harry J. Kirk.
LEROY W. HUNT, Toledo, Ohio,
Prosecuting Attorney, Lucas County,
Solicitor for Lucas County Commissioners.
GEORGE W. RITTER, Toledo, Ohio,
Director of Law of Toledo, Ohio,
MARTIN S. DODD, Toledo, Ohio.
DUDLEY F. SMITH, Toledo, Ohio,
Solicitors for the City of Toledo.
GEORGE W. RITTER, Toledo, Ohio,
Solicitor for the Villages of Maumee and Waterville, Ohio.

INDEX.

Page

Statement of the Case 1
Terms and provisions of appellee's leases 3
Appellee's leases made under authority of Act of March 23, 1840 4
Act of May 11, 1927, Appendix to this brief, page 73, abandoning Lineal Part Two of canal and terminating leases 8
Allegations of bill of complaint 10
Deed from State of Ohio to City of Toledo under Act of January 22, 1920, Appendix to this brief, page 72, abandoning Lineal Part One of the canal 10
Direct appeal to this court from District Court under provisions of Judicial Code 266 12
Holding in decision of District Court 12
History of the Miami and Erie Canal 13
Inaugural address of Governor Brown, December 14, 1818 13
Resolution of House of Representatives of Ohio, January 7, 1819 14
Message of Governor Brown to General Assembly, January 8, 1819 14
Act of February 23, 1820, appointing three commissioners for locating canal routes 14
First report of canal commissioners, January 3, 1823 15
First suggestion of use of canal for water power in report of canal commissioners, January 3, 1825 16
Act of February 4, 1825, authorizing the construction of canals in Ohio 16
Act of Congress, May 24, 1828, Vol. 4, Statutes at Large, 305, granting lands to Ohio in aid of canals 17
Sale or lease of surplus water for hydraulic and other purposes first authorized by Act of March 23, 1840 17

Page

Act of March 21, 1917, appendix to this brief, page 70, reducing term of leases to twenty-five years 18

Judicial pronouncement of purpose of Ohio canals. 18

Summary of Argument 19

Specification of Errors 23

Argument:

I Principal purpose for which canal was built and effect of abandonment of canal on water leases. Holdings of other state courts on effect of abandonment of state canals..... 23

II Water leases of appellee were made pursuant Act of March 23, 1840, Appendix to this brief, page 69, several times interpreted by the Supreme Court of Ohio, under which the right was reserved to the State of Ohio to abandon the canal and terminate the leases without liability to lessees..... 27

III Appellants, Villages of Maumee and Waterville, are entitled by their riparian rights to have water in canal restored to its natural channel in the Maumee River. Appellee is without equity 30

IV and V The rights under appellee's leases being subject to the terms and conditions of the Act of March 23, 1840, and the interpretation thereof by the Supreme Court of Ohio and this court, the question presented is stare decisis; and any change in public policy and circumstances does not change the effect and construction of said leases..... 31

VI Furnishing hydraulic power by the state to appellee is a private as distinguished from governmental function and a public trust is

		Page
	imposed on navigable waters prohibiting proprietary use	38
VII	Non-user does not constitute abandonment; abandonment of Lineal Part Two of the canal was only by Act of May 11, 1927, appendix this brief, page 73, expressly so declaring. Board of Public Works cannot bind the state in its proprietary capacity. Inconsistent claim of appellee as to Act of April 9, 1902	40
VIII and XI	Deed from State of Ohio to City of Toledo, Exhibit 15, created no obligation on the state to continue canal. The decision in Maumee Valley Electric Co. vs. City of Toledo, 13 Fed. (2d) 98, did not hold appellee had any right against the state resulting from said deed and said decision could not bind appellants, other than City of Toledo, who were not parties thereto	42
IX	Claim of appellee in regard to Purdy lease, Exhibit 7, is a moot question. Purdy lease not distinguishable from other leases of appellee	46
X	Holding in District Court that the case of State ex rel. vs. Middletown Hydraulic Co., 114 O. S. 436, changed rule of previous decisions in the Supreme Court of Ohio is erroneous. Analysis of Middletown case. The syllabus and not the opinion states the law of the case in the Supreme Court of Ohio under its Rule VI.	55
Appendix, at end of this brief		69
I	Act of March 23, 1840, Sections 20, 21, 22, 23. 38 Ohio Laws 87	69
II	Act of March 21, 1917. 107 Ohio Laws 418	70

Page

III Act of April 9, 1902, Section 2. 95 Ohio Laws 118-120 71
IV Act of January 22, 1920, Sections 6 and 7. 108 Ohio Laws, Part 2, 1138 72
V Act of May 11, 1927, Sections 14178 to 14178-12 of the General Code of Ohio, 112 Ohio Laws 360-363 73

2. **Table of Cases**:

Adams vs. Hodgkins, 109 Me. 361 40
Arrowsmith vs. Harmoning, 42 O. S. 254 32
Attorney General vs. Adelid Steamship Co. (1913) A. C. 781 33
The Baltimore & Ohio Rd. Co. vs. Baillee, 112 O. S. 567 ..... 59, 60
Banks vs. DeWitt, 42 O. S. 263 30
Beckwith vs. Howard, 6 R. I. 1 38
Bradshaw vs. Mill Co., 52 Minn. 59 39
Buckingham vs. Smith, 10 Ohio 288 ..... 31, 38, 39
Calder vs. Michigan, 218 U. S. 591-598 66
Cincinnati vs. Taft, 63 O. S. 141 32
Commonwealth vs. Railroad Co., 51 Pa. State 351 27
Cooper vs. Williams, 5 Ohio 391 31
Douglass vs. Pike County, 101 U. S. 677 ..... 37, 65
Elevator Company vs. Cincinnati, 30 O. S. 629 ..... 24, 25, 26, 30, 55, 57, 59, 65
Farmers' Irr. Dist. vs. Frank, 72 Neb. 136 41
Fishback vs. Woodruff, 51 Ind. 102 27
Fox vs. Cincinnati, 104 U. S. 783, 19, 23, 26, 28, 29, 30, 55, 57, 59, 65
Fox vs. Cincinnati, 33 O. S. 492 ..... 19, 23
Harding vs. Jordan, 140 U. S. 371 66
Hoagland vs. Railway Co., 111 Ind. 443; on rehearing, 111 Ind. 451 ..... 27, 36
Horner vs Graves, 7 Bingham 735 33
Hubbard vs. Toledo, 21 O. S. 379, 22, 23, 24, 25, 27, 28, 30, 38, 46, 55, 57, 59

Page

Illinois Central R. Co. vs. Illinois, 146 U. S. 387... 39
Jessup vs. Loucks, 55 Pa. State 350..... 27
Kaukauna Co. vs. Green Bay, etc., Canal, 142 U. S. 255 .....26, 31, 38, 39
Kulp vs. Fleming, 65 O. S. 321..... 30
Maumee Valley Electric Company vs. City of Toledo, 13 Fed. (2d) 98.....22, 44, 46, 58
Nordenfelt vs. Maxim Guns and Ammunition Co., 1894, A. C. 535..... 33
Ohio ex rel. vs. Railway Company, 53 O. S. 189... 47
Ranch Co. vs. Argile, 28 Utah 398..... 41
Railway Co. vs. Dittey, 232 U. S. 587-589..... 59
Robb vs. Irwin, 15 Oh. 689..... 32
Rossmiller vs. State, 114 Wis. 169..... 39
Seattle Electric Co. vs. Power Company, 40 Washington 380 33
Skellen vs. Water Works, 49 Ind. 193..... 27
State ex rel. vs. Edmondson, 89 O. S. 107..... 59
State vs. Board of Public Works, 42 O. S. 607.....24, 39, 55, 56, 65
State ex rel. vs. Middletown Hydraulic Company, 114 O. S. 437.....22, 55, 56, 59, 60, 64, 65
State ex rel. vs. Railway Company, 37 O. S. 157... 18
Sweet vs. Syracuse, 129 N. Y. 316..... 31
Trustees vs. Brett, 25 Ind. 409..... 27
Varick vs. Smith, 5 Paige (N. Y.) 137..... 38
Voight vs. Railroad Company, 58 O. S. 123..... 24, 30, 55, 56, 59
Virginia vs. West Virginia, 238 U. S. 202..... 37
Walker Realty Company vs. American Surety Company, 60 Utah 435..... 38
Walsh vs. Railroad Company, 176 U. S. 469, 477... 19
Warburton vs. White, 176 U. S. 484.....30, 32
York Haven Water & Power Company vs. York Haven Paper Company, 201 Fed. 270..... 52
Rules of the Supreme Court of Ohio: 5 O. S. vii; 73 O. S. x; 94 O. S. ix..... 59

Page

Text Books:

Williston on Contracts, Vol. 3, Section 1630 33
History of the Ohio Canals by Kilbourn 14, 15, 16

Statutes:

18 Ohio Laws 147—February 23, 1820 ..... 15, 19
23 Ohio Laws 50—February 4, 1825 ..... 16, 47
38 Ohio Laws 87—March 23, 1840—Sections 14009-14013, inclusive, General Code of Ohio, 1910 Edition 4, 17, 19, 20, 24, 27, 29, 31, 41, 56, 57
43 Ohio Laws 453—March 12, 1845 ..... 3, 48
95 Ohio Laws 118-120—April 9, 1902—Section 14218, General Code of Ohio 32, 34, 35, 36, 41
102 Ohio Laws 168—Section 14188-1 et seq., General Code of Ohio 34
103 Ohio Laws 720—Section 14188-6 (a) et seq., General Code of Ohio 34
106 Ohio Laws 293—Section 14188-6 (h), General Code of Ohio 34
106 Ohio Laws 499—Section 14176-1 et seq., General Code of Ohio 34
107 Ohio Laws 418—March 21, 1917—Section 14009, General Code of Ohio 5, 18
107 Ohio Laws 572—Section 14188-9, General Code of Ohio 34
108 Ohio Laws, Part 2, 1138 et seq.—January 22, 1920—Section 14188-15 et seq., General Code of Ohio 11, 22, 34, 42, 43, 44, 45, 46
109 Ohio Laws 369 35
110 Ohio Laws 638 42
112 Ohio Laws 360-363—May 11, 1927, Sections 14178-14178-12, General Code of Ohio 1, 8, 10, 12, 13, 21, 22, 23, 30, 35, 42, 43, 45, 46
4 United States Statutes at Large 305—May 24, 1828 17
Judicial Code, Section 266 2
Constitution of Ohio, Art. II, Sec. 1 10

IN THE
SUPREME COURT OF THE UNITED STATES

No. 674

October Term, 1928

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO; THE VILLAGE OF MAUMEE, OHIO; THE VILLAGE OF WATERVILLE, OHIO; AND THE CITY OF TOLEDO, OHIO,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

STATEMENT OF THE CASE

This cause comes here by direct appeal from a final order and judgment of the District Court of the United States for the Southern District of Ohio, Eastern Division, whereby the provisons of Section 14178-14178-12,

All italics ours unless otherwise noted.

inclusive, of the General Code of Ohio, insofar as they provide for the draining of the water from a side-cut in the Village of Maumee southwesterly to the point where the canal joins the Maumee River, and insofar as said sections of the General Code declares certain leases owned by appellee to be null and void, are repugnant to and in contravention of the constitution of the United States, and enjoin the appellant Kirk, an officer of the State of Ohio, from performing the duties imposed upon him by the laws of said state. The judgment and order of injunction was granted by three judges sitting in pursuance of the requirements of Section 266 of the Judicial Code, pursuant to which section this appeal was taken.

The Miami and Erie Canal as originally constructed extended from the City of Toledo southwesterly through the Villages of Maumee and Waterville to a point where the same enters the Maumee River. (Map Exhibit 25, Rec. 168, side folio 183.) There is a side-cut in the Village of Maumee. We will refer to the part of the canal from the side-cut north as "Lineal Part One," and the part from the Maumee River side-cut south to the point where the same connects with the Maumee River as "Lineal Part Two."

The appellee owns a hydro-electric plant in the Village of Maumee about 1.6 miles northerly from the Maumee River side-cut located on Lineal Part One of the canal. For the purpose of supplying water for this hydro-electric plant, the appellee has acquired, by assignment, leases from the Board of Public Works of the State of Ohio to various lessees, as follows:

Robert J. Law lease, executed March 12, 1895, for a term of thirty years, covering the use of sur-

plus water at the site of the aforesaid hydro-electric plant (Exhibit 1, Rec. 68).

Studer lease, executed November 13, 1906, for a term of thirty years, covering the use of water for hydraulic power at Waterville (Exhibit 3, Rec. 77).

Tryon lease, executed April 8, 1903, for a term of thirty years, covering the use of surplus water at Maumee in the vicinity of the side-cut (Exhibit 4, Rec. 82).

Maumee Paper Company lease, executed April 8, 1903, for a term of thirty years, covering the use of surplus water at Maumee (Exhibit 5, Rec. 88).

Detwiler lease, executed February 20, 1901, for a term of thirty years, covering the use of surplus water at Maumee (Exhibit 6, Rec. 95).

In the aforesaid Tryon and Maumee Paper Company leases there is a specific provision that the water used "will at all times return into the canal after being used for hydraulic purposes." (Rec. 84, 85, 90, 91.)

The Purdy lease (Exhibit 7, Rec. 101) authorizing the taking of the water from the canal in perpetuity, was executed December 8, 1845, pursuant to the authority of resolution passed by the General Assembly March 12, 1845, 43 Ohio Laws 453. Said resolution authorized the Board of Public Works to purchase from Purdy the right to which he was entitled as a riparian owner to water flowing into the Maumee River at Grand Rapids, which the state desired, and to pay the same in surplus water. Purdy was required to execute a conveyance in fee of his estate and he received in return therefor the agreement of the state to create a dam and to sell him water to be agreed upon pursuant to a lease free from rent, which

lease was required to be in the usual form of a lease used by the Board of Public Works.

Each of the foregoing leases, except the Purdy lease, contained a provision for the payment of annual rentals to the State of Ohio, and provided for the termination of the annual rental upon failure of the state to furnish the water provided for therein. The above mentioned leases contained options for renewal thereof for a like term of years for an annual rental as might be offered by the highest responsible bidder, which bidder should also agree to purchase from the lessee all the permanent and valuable buildings necessarily erected by the lessee for the convenient use of the water power thereby leased as such buildings should be adjudged to be worth by three freeholders to be chosen as therein specified; that if no bid should be made on the terms therein mentioned, at a higher rental than specified in such lease, the lessee should be entitled to renewal of the terms of the lease.

The aforesaid leases were executed by the Commissioners of Public Works of the State of Ohio pursuant to the provisions of the Act of the legislature, 38 Ohio Laws 87, Sections 20, 21, 22, and 23 (for copy see Appendix, pages 69, 70, Sections 14009-14013, inclusive, of the General Code of Ohio, 1910 Edition), which provide in substance that whenever in the opinion of the board of public works there shall be surplus water in the canals, over and above the quantity of water which may be required for the purpose of navigation, the commissioner of public works may order such surplus water and lands of the state for the purpose of using the same, as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and

reservations as they may consider necessary and proper, either in perpetuity or for a limited number of years, for a certain annual rental, or otherwise, as they might deem beneficial for the interests of the state; that no hydraulic power or right to use any water should be sold, leased or conveyed, except such as accrued from *surplus water of the canal* or from water passing around any lock, and that every such lease, grant or conveyance of water power should "*contain a reservation and condition, that the state or its authorized agents, may, at any time, resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purposes of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation of either of the canals, feeders or streams, from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns.*"

This Act continued in effect from 1840 until it was amended in 107 Ohio Laws 418, passed March 21, 1917, which amendment only changed said Act so as to limit the term of years under any lease to twenty-five years (Appendix page 71, Section 14009, Ohio General Code).

The appellee in the year 1900 acquired the above mentioned Law lease (Exhibit 1) which is the principal lease except for the Law supplemental lease (Rec. 60, par.

4), and thereupon constructed a hydro-electric plant. (Bill of Complaint, page 8.) The Purdy lease was acquired by appellee April 27, 1910 (Rec. 60, par. 4.)

On December 10, 1910, a lease was executed, known as "Law Supplemental Lease" (Exhibit 2, Rec. 74), to Law, as lessee, which provides that during the remainder of the term of the Law lease (Exhibit 1): First, the state should let into the eighteen-mile level of said canal at Grand Rapids, from the pool above, waters of the Maumee River equal to the safe capacity of said canal for use for hydraulic purposes at the mill of the appellee located near Maumee, and to cause as large, steady and even flow of such waters as may be practicable except in cases of unavoidable accident or public safety, all consistent with the rights of navigation upon said canal; and second, that the state should require the superintendent of canals to appoint three patrolmen who should be paid for their services by appellee and who should be required to patrol said canal banks between Grand Rapids and Lock No. 45, to repair breaks in the canal banks, stop leaks, remove logs, brush and other impediments; and third, that the state

> "does sell and lease unto the Company, all of the increased water passing over the weir of said Company provided for by this agreement"; and

fourth, that the company (appellee) agreed to maintain its weir at all times at the level at which the same is constructed or on the order of the board of public works, at such level as said board may hereinafter require; and fifth, the company (appellee) agreed to complete the excavation of the rock bars in the canal near Waterville as well as remove all other obstructions on the eighteen-mile level and to raise the banks thereof with all pos-

sible diligence at its own proper expense; and sixth, the company (appellee) agreed to pay the compensation of the three patrolmen to be appointed by the state at a daily wage of not less than One and 25/100 Dollars ($1.25); and seventh, the company (appellee) further agreed to pay the State of Ohio the sum of Fifteen Hundred Dollars ($1500.00) per year in addition to the Five Hundred Dollars ($500.00) provided for in the Law lease and to pay an additional Fifteen Hundred Dollars ($1500.00), making Thirty-five Hundred Dollars ($3500.00) in all, in case the amount of water specified in the seventh section should be furnished; and eighth, all payments except premium payments for uninterrupted service are to be made subject to all the provisions specified in the Law lease; and ninth, this agreement was to continue until the 12th day of March, 1925, unless sooner terminated by default on the part of the company, and it is provided that:

> "A cancellation of said lease of March 12, 1895, for any cause whatsoever, shall work a cancellation of all the obligations on this supplementary agreement."

It will be observed that the Law supplemental lease has expired and that there is no provision in this lease or agreement for a renewal thereof. It is the contention of appellants that the rights of appellee thereunder have terminated.

On August 7, 1924, prior to the expiration of the thirty-year term in the Law lease (Exhibit 1), the Studer lease (Exhibit 3), the Tryon lease (Exhibit 4), the Maumee Paper Company lease (Exhibit 5) and the Detwiler lease (Exhibit 6), the appellee filed (Exhibit 19, Rec. 140)

with the board of public works of the State of Ohio as an election to renew the aforesaid leases, and likewise attempted to renew the provisions of the Law supplemental lease (Exhibit 2). The board of public works, however, did not execute renewal leases in accordance with the election (Stip. 9, Rec. 62). To give effect to the claims of the appellee as to the Law lease and Law supplemental lease requires the assumption that its election for a renewal was valid and that the various terms and provisions in connection therewith had been complied with, and that such renewal had in fact been granted. (Note terms of this request, which asks for a renewal of the Law supplemental lease (Exhibit 2), to which appellee was not entitled.) Neither did said appellee make any further effort to procure the execution of renewals of said leases in accordance with the terms of the renewal provisions therein contained and the statutes of the State of Ohio, for if the contention of appellee as to the terms of said Law lease (Exhibit 1) and Law supplemental lease (Exhibit 2) is correct, then the terms of a new lease would have contained a provision giving appellee an option to renew the same for a period of thirty years, and thus, if the state would be required to embody a renewal option in the renewal lease, the state would, at the option of appellee, or its assigns, in perpetuity, be required to maintain the canal to the detriment of the public for the use and benefit of appellee, or its assigns.

On May 11, 1927, the legislature of the State of Ohio, over the objection of the governor, enacted Sections 14178-14178-12, inclusive, of the General Code of Ohio, 112 Ohio Laws, 360-363 (Appendix pages 73 to 78), which provide that the Miami and Erie Canal in Lucas County

from a point below the head of the Maumee River side-cut southerly to the point where the canal joins the Maumee River on the westerly side (Lineal Part Number Two) thereof be abandoned for canal and hydraulic purposes; that the State of Ohio reserves the title to the canal lands in fee simple; that all existing leases for canal or hydraulic power purposes on the portion of the canal so abandoned become null and void on and after sixty days from the taking effect of said Act; that the state highway director, within sixty days from the taking effect of the Act, should drain the water from the abandoned portion of the canal and prevent the water of the Maumee River from flowing into or through the abandoned portion thereof; that said abandoned portion of the canal should be under the supervision and control of the state highway director and should be devoted to highway and park uses and purposes; that the director of highways should cause surveys thereof to be made, together with maps and plats thereof; that no portion thereof should be leased for any purpose, but that until the State of Ohio should construct and improve the same for a highway, municipal corporations through which such highway should pass when completed and the commissioners of Lucas County should be permitted to use said canal lands for public purposes only without compensation; the Act also authorized the commissioners of Lucas County, the council or other legislative body of municipalities or townships through which such portion of the canal passed, the right to remove bridges crossing the abandoned portion thereof, and to grade and construct roads and streets across the channel of the abandoned portion thereof by necessary fills or grades, and author-

ized and directed the county commissioners of Lucas County to authorize the draining of the water from said abandoned portion and to prevent the water from flowing into or through said abandoned portion of the canal; and likewise made provision for leasing lands not necessary for highway purposes. This Act became effective as a law on August 10, 1927, in view of the referendum provisions of Article II, Section 1, of the Constitution of Ohio.

The bill of complaint (Rec. 1) alleges appellee's claim to the right to use hydraulic power by virtue of the leases and agreements (Exhibits 1-7, inclusive) and the application of appellee for renewal (Exhibit 19, Rec. 140), and further alleges that the director of highways of the State of Ohio is, in pursuance of the Act of May 11, 1927, intending to drain the water from the abandoned portion of the canal (Lineal Part Two), and that the draining of the water from the canal will be a taking of its property without compensation and without due process of law, in violation of the Federal Constitution, especially the Fourteenth Amendment, and also claims that said Act of May 11, 1927, impaired the obligations of a contract between the State of Ohio and City of Toledo which it claims was made for its benefit, and said agreements of lease for hydraulic power.

The circumstances under which the appellee claims that there was a contract between the State of Ohio and the City of Toledo for its benefit arose out of the purchase by the City of Toledo of the portion of the canal from the Maumee River side-cut northerly (Lineal Part One) by deed of December 29, 1922 (Exhibit 15, Rec. 133), authorized by an Act of the General Assembly

passed January 22, 1920, 108 Ohio Laws, Part 2, pages 1138 *et seq.*, which deed conveyed to the City of Toledo the canal from the Maumee River side-cut to the northerly portion thereof, excepting therefrom and subject to the rights of owners of existing leases of lands or water, or both, and excepting therefrom the rights of said owners to a renewal of existing leases. The Act of January 22, 1920, provided for the abandonment for canal and hydraulic purposes of the portion of the canal (Lineal Part One), authorized a survey and an appraisal of the lands to be made, and granted to the City of Toledo an option to lease or purchase said lands. Said Act (Section 6) provided that if the City of Toledo should signify its intention to purchase said property, the governor was authorized, as soon as the purchase price had been paid into the state treasury, to execute a deed conveying the same in fee simple to the City of Toledo, excepting therefrom and subject to the rights of owners of existing leases of either lands or water, or both, and the rights of said owners to a renewal of existing leases; and further provided that in case the amount of compensation could not mutually be agreed upon, the City of Toledo should have the right, under the provisions of the General Code, to condemn the rights of such lessees for the use of the municipality, *and further provided that the Act should not be construed as granting to the lessees any rights in addition to those granted to them in their existing leases.* (For Sections 6 and 7 see Appendix page 72.)

The evidence is presented by an agreed statement of facts, (Rec. 57-69 inclusive) together with exhibits thereto attached (Rec. 68-169 inc.)

The answers (Rec. 29 to 50, inc.) of appellants in effect denied that the Act of May 11, 1927, would violate the guaranty of the Constitution of the United States.

This cause came on for hearing before the Honorable Maurice H. Donahue, United States Circuit Judge of the Sixth Circuit; the Honorable Benson W. Hough, and the Honorable Smith Hickenlooper, United States Diistrict Judges for the Southern District of Ohio, in view of Section 266 of the Judicial Code, requiring three judges, one of whom shall be a Circuit Judge, to authorize an injunction to restrain the enforcement, operation or execution of a state statute by restraining the action of an officer of the state. The court held in favor of the appellee and found (Rec. 185) that the provisions of the Act of May 11, 1927, 112 Ohio Laws 360-362, insofar as it declared or attempted to declare the leases, agreements and grants from the State of Ohio for water to be taken from that portion of the canal described in the Act (Lineal Part Two) to be null and void, and insofar as it directed the state highway director to drain the water out of said portion of said canal and to prevent the waters of the Maumee River from flowing into said canal, and granted to appellants permission to fill said canal and obstruct the flow of the water therein, were contrary to and in contravention of the Constitution of the United States, and therefore null and void and of no effect with respect to and as affecting or intending to affect leases, agreements and grants of the appellee referred to in the bill of complaint and in the record (Rec. 186), and enjoined (Rec. 187) the appellant Kirk, as Director of Highways of the State of Ohio, and each of the other appellants and his or their respective succes-

sors, and their various officers, agents, associates, appointees and employees and their respective successors, during the existence of the leases, agreements and grants of appellee (a) from draining or causing to be drained from the portion of the canal described in said Act of May 11, 1927 (Lineal Part Two), which, except for such draining would be available to appellee for its use, to the amount provided for and called for in said leases and agreements; namely, the Law lease (Exhibit 1), the Law supplemental lease (Exhibit 2), the Studer lease (exhibit 3), the Tryon lease (Exhibit 4), the Maumee Paper Company lease (Exhibit 5), the Detwiler lease (Exhibit 6), and the Purdy quit-claim grant (Exhibit 7); and (b) from doing or causing to be done any act, matter or thing in any way, or by any means, with respect to the Maumee River which would prevent or in anywise interfere with or obstruct the flow into or throughout or northeasterly beyond said portion of the canal above described (Lineal Part Two)—(meaning thereby to Lineal Part One) which, except for such prevention, obstruction, or interference would and will be available to the appellee for its use to the amount provided for and called for in the leases, agreements and grants of appellee.

HISTORY OF THE MIAMI AND ERIE CANAL

The matter of constructing a canal in Ohio it seems first appears in an inaugural address of Governor Brown, delivered on December 14, 1818, in which he said in substance that to raise the character of our state by increasing industry and our resources, it was necessary to improve the internal communications, and open a cheaper

way to market for the surplus produce of a large portion of our fertile country. ("History of the Ohio Canals," by Kilbourn, page 3.)

On January 7, 1819, a resolution was introduced in the House of Representatives of the State of Ohio, which provided for the appointment of a committee of five members of the house and ..... members of the senate to take into consideration the subject of internal improvements as related to the construction of a canal connecting the waters that flow into Lake Erie with those that flow into the Ohio River. ("History of the Ohio Canals," by Kilbourn, page 3.)

The following day Governor Brown sent a message to the legislative body, in which he said:

> "You will bear in mind, that our productions which form our only great resource, are generally of that bulky and ponderous description, as to need every easement in conveyance, that we can afford. Experience is a faithful monitor; and the millions expended for transportation during the late war, may teach an useful lesson; • • • Roads and canals are veins and arteries to the body politic, that diffuse supplies, health, vigor and animation to the whole system; • • • ." ("History of the Ohio Canals," by Kilbourn, page 3.)

On February 23, 1820, the General Assembly of Ohio enacted a law, in which it recited:

> "Whereas, the effecting a navigable communication, by means of a canal or canals, between Lake Erie and the Ohio River, would greatly promote the agricultural, manufacturing and commercial interests of a number of our sister states, of the union generally and of this state particularly." • • •

Therefore, it was enacted that three commissioners be appointed for locating a route for a canal between Lake Erie and the Ohio River, 18 Ohio Laws 147. ("History of the Ohio Canals," by Kilbourn, pages 12 and 13.)

On January 3, 1823, the canal commissioners made their first report. In this report reference is made to the advantage of canal navigation over other modes of transportation. It is said in part:

> "The advantages of canal navigation over any other mode of conveyance, are now so generally known, and so justly estimated that a minute analysis (of) them is not deemed necessary. The fertility of our soil promises to secure to the labors of agriculture an abundance, very far beyond any probable consumption in our own territory.
>
> "The amount of tonnage which this surplus may furnish for the employment of a canal navigation cannot be estimated by the commissioners. * * *
>
> "But the products of agricultural labor will not be the only articles of bulk and value, the transportation of which to distant markets will be opened by a canal navigation. Among various other articles which may be mentioned, the gypsum of Sandusky, [illegible] the fisheries of the upper lakes are inexhaustible sources of supply to the interior of the state, and the vast region of the south, of an article of great value to agriculture, and the arts; and an article at present of costly diet, owing to the expense of land transportation from the Atlantic cities.
>
> "The mineral coal of Ohio, is another material at present of value only in its immediate neighborhood; which by a canal navigation would become an important and very valuable article of exportation. * * *
>
> "In estimating the value of our surplus productions, it must not be forgotten that every saving in the expense and labor of transportation to market directly, increases that value and as directly also,

> increases the value of our lands. * * * That on a canal, one horse will transport as much as will require the labor of 30 horses upon land; * * *." ("History of the Ohio Canals," by Kilbourn, pages 37 and 38.)

Nowhere does this report make any reference to the use of the canal for hydraulic power.

The first suggestion of the use of the canal for water power is found in a report of the canal commissioners under date of January 3, 1825, when for the first time there was a recognition that there was a possibility of utilizing water power. The report shows that in three years from the commencement of the work, an extensive and valuable water power at the southern termination of the canal in Cincinnati would be at the disposal of the state, the amount of water which might be taken from the canal, and the possible income therefrom. ("History of the Ohio Canals," by Kilbourn, page 141.) It will be noticed that in the report reference is made to the water so to be used as "surplus water."

On February 4, 1825, the General Assembly of Ohio, by an Act found in 23 Ohio Laws 50, provided for the appointment of a Board of Canal Commissioners, authorized and empowered the canal commissioners to construct a navigable canal on various routes in the State of Ohio, including the Miami and Erie Canal from Cincinnati to the Maumee River, the expenses thereof to be paid out of the funds of the State of Ohio. These commissioners were authorized to establish reasonable tolls and deputy marshals for the collection and payment thereof, and to take and use waters and streams of the State of Ohio, but no provision was made therein for the leasing of hydraulic power.

By an Act of Congress passed May 24, 1828, Volume 4, United States Statutes at Large 305, it was provided that lands granted to the State of Ohio be subject to the disposal of the legislature and

> "Provided, That said canal, when completed, shall be, and forever remain, a public highway, for the use of the government of the United States, free from any toll or other charge, whatever, for any property of the United States, or persons in their service, passing through the same: * * *"

It was further provided in said Act that the State of Indiana be authorized to convey and relinquish to the State of Ohio, upon terms to be agreed upon, the right and interest granted to the State of Indiana to lands within the State of Ohio by an Act approved March 2, 1827, which authorized the granting of certain quantities of land for the purpose of aiding the State of Indiana in opening a canal to connect the waters of the Wabash River with those of Lake Erie.

(Surely it could not have been the purpose of the State of Indiana to connect the waters of the Wabash River with those of Lake Erie for the purpose of providing hydraulic power for citizens of the State of Ohio. Thus it is apparent that the purpose of the canal was for navigation, and that the use of water power came up as an incidental purpose.)

The first legislation directly authorizing the board of public works to sell or lease the right to the use of surplus water was enacted on February 18, 1830, 28 Ohio Laws 58, which was superseded by the Act of March 23, 1840, 38 Ohio Laws, page 87 (Sections 20, 21, 22, 23 are shown in Appendix pp. 69 and 70). This last Act authorized the board of public works to sell or lease the right

to use surplus water for hydraulic or other purposes whenever there should in the opinion of the board of public works be any surplus water. Such right, however, was by said Act, subject to the rights of the state for navigation purposes, and that no water should be used or taken by the lessee or vendee if necessary for the purpose of navigation.

The Act further provided that every such lease, grant or conveyance of *water power* should contain a reservation or condition that the state, or its authorized agents, might resume the right or privilege to the use of the water, or any portion thereof, whenever it was deemed necessary for the purposes of navigation or whenever its use for hydraulic purposes should be found to interfere with and injuriously affect navigation, and whenever such privileges should be resumed in whole or in part, the sum paid therefor or rent reserved or the reasonable portion thereof should be determined upon agreeably to the stipulations or agreements of the deed of conveyance and be refunded or remitted to the purchaser or lessee.

This Act continued in effect until amended by the Act of March 21, 1917, 107 Ohio Laws 418, Section 14069, Volume 3 of Page's Annotated Ohio General Code (appendix pp. 70, 71). The amendment to the Constitution of Ohio had transferred to the superintendent of public works the duty formerly imposed upon the board of public works. The amendment of March 21, 1917, carried this into effect and reduced the term of the water leases to twenty-five years.

In the case of *State ex rel. vs. Railway Company*, 37 O. S. 157, it was held that the object of the state in constructing the canal was to effect a navigable com-

munication between Lake Erie and the Ohio River in order to promote the agricultural, manufacturing and commercial interest of a number of our sister states of the Union generally and of this state particularly, in effect the language of the law enacted by the General Assembly on February 23, 1820.

Fox vs. Cincinnati, 104 U. S. 783; 33 O. S. 492.

Walsh vs. Railroad Company, 176 U. S. 469, 477; 58 O. S. 123.

SUMMARY OF ARGUMENT

Appellants contend:

I. That the governmental and principal purposes for the establishment of the canal were for transportation; that the use of surplus water for hydraulic power by various lessees of the State of Ohio was an incidental purpose and therefore the State of Ohio had a right to terminate the use of the canal for navigation purposes at such time as it chose, and upon its determination to abandon the canal for navigation purposes the rights of lessees to use the surplus water of the canal for hydraulic purposes, being incidental to the main purpose, thereby ceased, without compensation to such lessees on account of any loss resulting therefrom.

II. That the Act of 1840, Section 38 Ohio Laws 87, Swan's Statutes of Ohio, 1841, pages 174-200, pursuant to which leases of the appellee were executed, correctly interpreted, give the state the right to abandon any portion of the canal at any time, and thereby terminate all rights under leases for hydraulic power, subject only to

the right of such lessees to receive back from the state such proportion of the rentals which the lessees may have paid in advance as the unexpired part of the term of the lease bears to the rent paid.

III. That the legislature of the State of Ohio had a right to abandon the canal for navigation purposes, and, having abandoned the canal for navigation purposes, the rights of appellants, Villages of Maumee and Waterville, required that the water from the Maumee River follow its natural course, and that the failure of the state to return the water to the natural course of the Maumee River, depriving said villages of the free and uninterrupted flow of the water into the natural channels, is unlawful.

IV. The leases of the appellee were executed after the Supreme Court of the State of Ohio, as well as the Supreme Court of the United States had determined that in view of the provisions of leases executed by the board of public works pursuant to the Act of 1840, 38 Ohio Laws 87, the use of the water for hydraulic purposes was but an incident to the principal object for which the canal was built; that when the canal was no longer needed for its principal object, namely, navigation, the state had a right to abandon the same without creating any liability to continue to supply water for hydraulic purposes, and that every lessee of hydraulic power took his lease and made his improvements with full knowledge of the reserved right of the state to discontinue the canal and to stop the supply of water, and therefore the appellee and its predecessors in title took whatever rights were granted to them by their respective leases subject to the construction of the terms and conditions thereof as pro-

nounced by the Supreme Court of Ohio and the Supreme Court of the United States, that changes in the circumstances because of the change in and development of methods of transportation, and changes in the economic conditions of the country would not and cannot enlarge the subject matter of these leases, so as to extend to the lessees rights which were greater than those granted at the time of the original leases; that no expansion or extension of such rights can be made by a change of circumstances, but that action on the part of the state by executing additional leases or grants would be required in order to convey to the lessees rights enlarging those originally granted to them.

V. That the legislature of the State of Ohio has the power to declare the public policy of the state and as such has the power from time to time to change the public policy of the state, and that no legislature can forever settle such public policy, nor foreclose a subsequent legislature from changing such public policy.

VI. To give effect to the claims of appellee would result in requiring the State of Ohio to devote public property to private use. This would be in violation on the part of the state of its duties to the public.

VII. That the State of Ohio did not and could not abandon the canal for navigation purposes by lack of use, but that such abandonment was only by act of the legislature expressly so declaring; that no such abandonment of the canal was effective as to Lineal Part Two until the Act of May 11, 1927, 112 Ohio Laws 360-363.

VIII. That the agreement between the State of Ohio and the City of Toledo, resulting from the deed from the State of Ohio to the City of Toledo (Exhibit 15), and

the provisions of the Act of the General Assembly, 108 Ohio Laws, Part 2, page 1138, created no obligation on the part of the State of Ohio to continue the canal.

IX. That any rights owned by the appellee under the Purdy lease relate to water taken from the canal on the southerly side of the Maumee River, whereas the portion of the canal abandoned by the Act of May 11, 1927, (Lineal Part Two), is on the northerly side of the Maumee River, so that the waters, if any, which the appellee claims it is entitled to receive under this lease, if appellee's construction thereof is correct, would not be interfered with by the abandonment of the canal; therefore any claim of appellee as to the Purdy lease is a moot question.

X. That the District Court erred in holding that the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company*, 114 O. S. 437, changed the rule established by its earlier decisions in the case of *Hubbard vs. Toledo*, 21 O. S. 379, and other kindred cases.

XI. That the decision of the United States Circuit Court of Appeals for the Sixth Circuit, in the case of *Maumee Valley Electric Company vs. City of Toledo*, found in 13 Fed. (2d) 98, interpreting the rights between the appellee and the City of Toledo (a) did not hold that appellee had any rights against the State of Ohio resulting from the deed from the State of Ohio to the City of Toledo (Exhibit 15); (b) that the decision and judgment of the Circuit Court of Appeals in said cause did not and could not bind the State of Ohio because the state was not, either directly or through any of its officers, a party thereto.

SPECIFICATION OF ERRORS

1. The District Court erred in decreeing that the Act of the General Assembly of Ohio passed on May 11, 1927, 112 Ohio Laws, 360-363, Sections 14178-14178-12, inclusive, of the General Code of Ohio, to be in contravention of and contrary to the Constitution of the United States so as to deprive the appellee of rights without due process of law, and in decreeing that said Section impairs the obligation of agreements and leases between the appellee and the State of Ohio.

2. The decree of the District Court is contrary to the decisions of the Supreme Court of Ohio and of this court.

ARGUMENT

I

The principal object for which the canal was built was navigation. The use of water for hydraulic power was an incidental purpose. When the canal is no longer needed for its principal object, namely, navigation, it may be abandoned without creating any liability on the part of the state to continue to supply water for hydraulic purposes. Every lessee of hydraulic power took his lease and made his improvements will full knowledge of the reserved right of the state to discontinue the canal and to stop the supply of water without compensation for any loss which any lessee might thereby sustain.

Fox vs. Cincinnati, 104 U. S. 783. Affirming
Fox vs. Cincinnati, 33 O. S. 492.
Hubbard vs. Toledo, 21 O. S. 379.

Elevator Company vs. Cincinnati, 30 O. S. 629.

State vs. Board of Public Works, 42 O. S. 607.

Voight vs. Railroad Company, 58 O. S. 123. Affirmed under name of Walsh vs. Railroad Company, 176 U. S. 469.

The question thus presented first arose in the case of *Hubbard vs. Toledo, supra,* in which the Honorable Morrison R. Waite, afterwards Chief Justice of the United States, was one of the attorneys for the plaintiff, Hubbard, the owner of a lease from the State of Ohio of hydraulic power located on the Miami and Erie Canal in the City of Toledo. That portion of the canal was abandoned without making any provision for compensating Hubbard on account of the use of water prior to the expiration of the term of his lease. The Supreme Court of Ohio held that the leases or agreements for the use of hydraulic power, in view of the terms and conditions of the Act of March 23, 1840, under which the same were authorized, must be interpreted to give to the state the right to abandon the canal for navigation purposes at such times as it might deem proper, withdraw the water from the canal, destroy the rights of the holders of water leases without liability for compensation to such holders; that the governmental power of the state authorizes the taking of water from natural water courses and diverting them to a canal for the purpose of navigation; that the purpose of the construction of the canal was to create a system of transportation by water, and that the leasing of water rights was simply incidental to the main pur-

pose. We quote from the syllabus of the Supreme Court of Ohio in that case:

> "2. The obstruction of a navigable stream cannot be maintained to promote private interests. Hence, when the state abandoned the Manhattan Branch Cana. the aqueduct, a part thereof, spanning and obstructing Swan Creek, which is a navigable stream, became a common nuisance, to abate which any riparian proprietor injured thereby had the legal right to invoke judicial proceedings.
>
> • • •
>
> "4. The abandonment of her public canals by the state, creates no liability on her part to respond in damages resulting therefrom to parties holding leases of 'surplus water,' under the Act of March 23, 1840, 'to provide for the protection of the canals of the State of Ohio, the regulation of the navigation thereof, and the collection of tolls'."

This question was again before the Supreme Court of Ohio in the case of *Elevator Company vs. Cincinnati, supra.* Afterwards litigation arose between Fox and the City of Cincinnati, in which the Supreme Court of Ohio for the third time affirmed the principles hereinbefore referred to. The case proceeded by writ of error to this court and Chief Justice Waite for this court rendered the opinion affirming the decision of the Supreme Court of Ohio, citing with approval the case of *Hubbard vs. Toledo, supra,* and *Elevator Company vs. Cincinnati, supra;* on page 785 it is said:

> "• • • and it never could have been intended in this way to impose on the state an obligation to keep up the canal, no matter what the cost, for the sole purpose of meeting the requirements of its water leases. There was certainly no duty resting on the state to maintain the canal for navi-

> gation any longer than the public necessities seem to require. When it was no longer needed, it might be abandoned; and, if abandoned, the water might be withdrawn altogether. Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation; but no such provision was necessary in respect to the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be asked of the state was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability. Every lessee of power took his lease and put up his improvements with full notice of the reserved right of the state to discontinue its canal and stop his supply of water."

As to the opinion of this court in *Fox vs. Cincinnati, supra*, and as to the case of *Elevator Co. vs. Cincinnati, supra*, this court in the case of *Kaukauna Co. vs. Green Bay, etc., Canal*, 142 U. S. 255, opinion by Mr. Justice Brown, said:

> "In the *Little Miami Elevator Company vs. Cincinnati*, 30 O. S. 629, the right to lease surplus water for private use was recognized as an incident to the public use of a canal for the purpose of navigation; but it was held that such use was a subordinate one, and that the right to the same might be terminated whenever the state, in the exercise of its discretion, abandoned or relinquished the public use. * * * 'By so doing,' said the court, 'the water power would cease to be an incident to the public use, and the state would be engaged in the private enterprise of keeping

> up and renting water power after it ceased to act as a government in keeping up the public use.' The same ruling was made by this court in *Fox vs. Cincinnati*, 104 U. S. 783."

Hubbard vs. City of Toledo, supra, was also cited.

Courts in other states considering abandonment of canals have likewise held that a canal is a public work constructed for a public purpose and that the leasing of water power is simply an incident to the canal and not the purpose of its creation; that a lessee of water power must have known the purpose for which the canal was constructed and took such leases subject to the use of the canal and of all the vicissitudes which might attend a public work of such character, namely, dilapidation, destruction or abandonment; such lessee had no legal right to suppose that the state would keep up the canal for the purpose of furnishing him water if it became inexpedient to maintain it as a public work.

Fishback vs. Woodruff, 51 Ind. 102.
Trustees vs. Brett, 25 Ind. 409.
Skellen vs. Water Works, 49 Ind. 193.
Hoagland vs. Railway Co., 111 Ind. 443; on rehearing 111 Ind. 451.
Commonwealth vs. Railroad Co., 51 Pa. State 351.
Jessup vs. Loucks, 55 Pa. State 350.

II

The Act of March 23, 1840, 38 Ohio Laws 87, until amended by the Act of March 21, 1917, provided the only authority under which the leases of appellee were exe-

cuted. These leases were made subject to the terms and provisions of said Act which provided in substance that every lease, grant or conveyance of water power should contain a reservation or condition that the state or its authorized agents might resume the privilege to the use of the water or any portion thereof whenever it is deemed necessary for the purposes of navigation or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect navigation and *whenever such privilege* (to the use of water) *shall be resumed in whole or in part*, the sum paid therefor or rent reserved or reasonable portion thereof should be determined upon agreeably to stipulations in the deed of conveyance and be refunded or remitted to the purchaser or lessee. Agreeable to this authority of the General Assembly, the leases of appellee each contained a provision that if, for the purposes, among other things, of repairing the canal or making improvements to the canal or works connected therewith, the lessee should be partially or wholly deprived of the use of any portion of the water power thereby leased so as to prevent the operation of any hydraulic works, then deduction should be made from the rent accruing on such portion of the water power as the lessee should be prevented from using as will bear the same proportion to the yearly rental thereof at the time during which said lessee had been deprived of its use bears to eleven months.

The leases under consideration in the case of *Hubbard vs. Toledo, supra*, and the other cases decided by the Supreme Court of Ohio, and also in the case of *Fox vs. Cincinnati, supra*, decided by this court, were exe-

cuted pursuant to the authority of the Act of March 23, 1840, with provisions in substance the same as the leases of appellee. These decisions of the Ohio courts and the decision of this court in *Fox vs. Cincinnati, supra,* hold that by the terms of the lease and of the statute authorizing it, the state assumed no responsibility to maintain the canals for the exclusive benefit of lessees of surplus water, and that said contracts of leases contained no express stipulation for the payment of loss to lessees in the event of abandonment of the canal; that the agreement of lease would not impress upon the state a liability by implication on account of abandonment, where no liability against the state was created on account of a resumption of water by the state within the purposes of the Act of March 23, 1840.

Upon this subject Mr. Chief Justice Waite, in the case of *Fox vs. Cincinnati, supra,* said:

> "Provision was made for resuming the water and stopping the supply, if the canal was kept up for navigation; but no such provision was necessary in respect to the abandonment of the whole work, because the right to abandon followed necessarily from the right to build. If the water was resumed while navigation was maintained, no matter how injuriously it affected lessees, all that could be asked of the state was to forego the further collection of rents, or refund a reasonable proportion of such as had been paid in advance. The entire abandonment of the canal could not create any different liability."

These leases of appellee were made during the period when the provisions of the Act of March 23, 1840, were without change in effect. If the Act of March 23, 1840, and the leases executed in pursuance thereof, at the

time of the decision of the case of *Fox vs. Cincinnati, supra,* and of the decisions by the Supreme Court of Ohio of the cases of *Hubbard vs. Toledo, Elevator Co. vs. Cincinnati* and *Voight vs. Railroad Co.* were subject to the interpretation as applied by these courts, there having been no amendment to the law, it would seem to follow that the leases and agreements subsequently made under the same authority, with the same terms and provisions, must of necessity have the same meaning.

Warburton vs. White, 176 U. S. 484.
Banks vs. DeWitt, 42 O. S. 263.
Kulp vs. Fleming, 65 O. S. 321.

III

The state takes water for the canal from the Maumee River at the southerly point of "Lineal Part Two" and carries the same northerly, thus diverting water which would, if uninterrupted, naturally flow in the channel of the Maumee River. Of course, the state had the right to divert the water from its normal flow through the channels of the Maumee River for navigation purposes. But upon abandonment of such purposes in accordance with the Act adopted May 11, 1927, the public purposes for which the state had been taking the water ceased. The rights of the appellee being solely on account of the use of water for hydraulic purposes and being a purpose incidental to the governmental purpose of navigation, the appellants who are adversely affected by the flow of the water through the canal instead of the natural channel of the Maumee River are entitled to

have the water of the Maumee River restored to its natural flow.

Cooper vs. Williams, 5 Ohio 391.
Buckingham vs. Smith, 10 Ohio 288-296 and 7.
Sweet vs. Syracuse, 129 N. Y. 316-335.
Kaukauna Co. vs. Green Bay, etc., Canal, *supra.*

The appellants, the Villages of Waterville and Maumee, are adversely affected by the diversion of the water from the Maumee River to the canal as the water now passes into the abandoned portion of the canal along an artificial channel through said villages instead of through the natural channel of the Maumee River. These appellants, as well as the state, are entitled to have the water flow freely and without interruption in the natural channels of the Maumee River in view of the abandonment by the state of the canal for navigation purposes. Appellee is therefore without equity and not entitled to the relief prayed for.

IV AND V

The leases of appellee were executed after the Supreme Court of the State of Ohio and this court construed the rights of the state under and pursuant to the Act of March 23, 1840, and leases containing in substance the exact terms and provisions of the leases of the appellee to mean that the state had the right at any time to decide so to abandon the canal for navigation purposes without liability to any lessee on account of such

abandonment and that such lessee took his lease and made his improvements with full knowledge of the rights reserved by the state to so abandon the canal without liability on account of the terms of the leases for hydraulic power. The appellee and its predecessors having so acquired its leases, made improvements and having knowledge of the construction and interpretation by this court and of the Supreme Court of Ohio of said Act of the legislature and of the provisions of said leases, cannot now complain that the abandonment by the state of the canal deprives them of any rights to which they are entitled. The question thus presented is clearly *stare decisis*.

Robb vs. Irwin, 15 Oh. 689, 703, 704.
Arrowsmith, vs. Harmoning, 42 O. S. 254.
Cincinnati vs. Taft, 63 O. S. 141, 161, 162.
Warburton vs. White, *supra*.

In the bill of complaint (Rec. 9) the appellee relies upon the provisions of Sections 14218 of the General Code, enacted April 9, 1902, 95 Ohio Laws 118, by which the legislature declared as a settled policy of the state that the Miami and Erie Canal, together with its water supplies, reservoirs, dams, feeders and adjacent land from Cincinnati to Toledo, should be retained and maintained as a public canal. Like declaration of policy was made as to the northern division of the Ohio Canal from Cleveland to Dresden on the Muskingum River. The bill of complaint copies the first section of said Act. The second section (Appendix page 72) anticipates change of public policy of the state as to the canals by providing that if the policy of the state should change

so as to abandon the canal, the state should pay to persons thereafter building boats for use on the canal the value thereof. We desire to emphasize the importance of this provision as showing the intent of the state as to the probability of changing its public policy, and likewise to emphasize the failure of the legislature to make any provision for compensation to the holders of water leases on account of loss sustained by reason of improvements subsequently made by them, in the event of the abandonment of the canal.

The public policy of the state is a variable thing. It fluctuates with circumstances of time. Public policy of the state is determined by its legislature and its courts, and whenever the interest of the public requires a change in public policy on account of varying conditions and circumstances the public policy must of necessity be changed, regardless of a declaration to the contrary by a previous legislature or by previous decisions of courts.

As said in Williston on Contracts, Vol. 3, Section 1630:

> "The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with circumstances of the time."

See also *Nordenfelt vs. Maxim Guns and Ammunition Co.*, 1894, A. C. 535; *Attorney General vs. Adelid Steamship Co.*, (1913) A. C. 781; *Horner vs. Graves*, 7 Bingham 735.

In the case of *Seattle Electric Co. vs. Power Company*, 40 Washington 380, it is said:

> "While courts of equity will not enforce contracts entered into either in violation of positive

law or a rule of public policy where the public interests of the parties thereto are alone involved, yet, when *the public interests* are involved, it will enforce such contracts as long *as such public interest requires it.*"

The legislature of the State of Ohio has consistently since 1902 and whenever the circumstances seemed to have arisen, by abandoning portions of the canal, altered the policy declared by the Act of April 9, 1902. For various acts of the legislature of Ohio, enacted since April, 1902, abandoning portions of the canal, see:

102 Ohio Laws 168 (Section 14188-1 *et seq.*, Ohio General Code) permitting the City of Cincinnati to use a portion of the canal for public streets, boulevards, sewerage, conduits and subway purposes.

103 Ohio Laws 720 (Section 14188-6 (a) *et seq.*, Ohio General Code) grants similar rights to the City of Cincinnati.

106 Ohio Laws 293 (Section 14188-6 (h), Ohio General Code) grants similar rights to the City of Cincinnati.

106 Ohio Laws 499 (Section 14176-1 *et seq.*, Ohio General Code) authorizing the sale to the City of Toledo of the portion of the canal northeasterly from that portion of the canal shown in Stipulation Exhibit No. 25, and northeasterly from the portions sold by the state to the city hereinafter referred to.

107 Ohio Laws 572 (Section 14188-9, Ohio General Code) authorizing quit-claim deed to the City of Toledo.

108 Ohio Laws, Part 2, pages 1138 (Section 14188-15 *et seq.*, Ohio General Code, pursuant to which a deed from the State of Ohio to the City of Toledo (Stipula-

tion Exhibit No. 15) was executed by the governor and delivered to the City of Toledo.

109 Ohio Laws 369, authorizing the sale of certain canal lands within the City of Toledo.

The Act of May 11, 1927, in terms repealed any Act inconsistent therewith, and therefore, insofar as Section 14218 of the General Code conflicts with the Act of May 11, 1927, the same is repealed; (Section 13 provides that all Acts or parts of Acts in conflict "with this Act be and the same are hereby repealed").

The principal lease, namely, the Law lease, was executed in 1895. The Detwiler lease was executed February, 1901. These constituted the principal leases. The Studer lease was executed in November, 1906, and calls for 2100 cubic feet of water per minute; the Tryon lease, executed in May, 1903, calls for 2050 cubic feet per minute; the Maumee Paper Company lease, executed in April, 1903, calls for 2050 cubic feet per minute, making a total number of cubic feet of water per minute to which appellee would be entitled under the leases executed after the passage of the Act of April 9, 1902, 95 Ohio Laws 118-120, to be 6200 cubic feet, or a very small quantity of water compared with the flow of water appellee now claims it is entitled to receive. It can not be claimed that the Law lease, executed March 12, 1895, which called for all of the surplus water in the canal not needed for navigation between Providence and Toledo, and the Detwiler lease which authorized the taking of 833 cubic feet per minute were executed in reliance upon any such public policy of the State of Ohio. As to the Law supplemental lease, Exhibit 2, it will be observed that in accordance with the ninth paragraph thereof the

agreement should continue until March 12, 1925, and no provision was made for extending the term beyond that time. The investment made by the appellee an account of the provisions of the Law supplemental lease, which are the only investments shown by the evidence (Rec. 161) to have been made by appellee since the enactment of the Act of April 9, 1902, must have been with the clear understanding and agreement that the Law supplemental lease, Exhibit 2, expired by its terms on March 12, 1925.

The bill of complaint further shows that the appellee in the year 1900, immediately upon the acquiring by it of Exhibit 1 constructed its hydro-electric plant (Rec. 6, 68 and 161). Therefore the appellee in no event is entitled to any consideration in equity on account of change by the General Assembly of any public policy declared by the Act of April 9, 1902, even though the law would permit a recovery on account of such change of public policy.

In *Hoagland vs. Railway Co.*, on rehearing 111 Ind. 451, the opinion of the court, after stating that the rights of the appellant were pursuant to a lease which did not convey any other rights than those to the use of surplus water not required for navigation purposes, said with reference to the argument of counsel as to changed circumstances requiring a different construction of the lease:

> "The changed circumstances of which counsel so often speak did not enlarge the subject of the demise. The grantees of the state are not in a different position than that of their grantor so far as respects the subject of the lease. That was not expanded by anything done by them or anyone else."

In the case of *Douglass vs. Pike County,* 101 U. S. 677, this court in considering the law of Missouri in relation to certain bonds, said, at page 687:

> "So far as this case is concerned, we have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper. We recognize fully, not only the right of a state court, but its duty to change its decisions whenever, in its judgment, the necessity arises. It may do this for new reasons, or because of a change of opinion in respect to old ones; and ordinarily we will follow them, except so far as they affect rights vested before the change was made."

In relation to applying new decisions, this court said:

> "* * * but we cannot give them a retroactive effect without impairing the obligation of contracts long before entered into. This we feel ourselves prohibited by the Constitution of the United States from doing."

Mr. Justice Hughes in the case of *Virginia vs. West Virginia,* 238 U. S. 202, at page 236 said:

> "The lapse of time has not changed the substance of the agreement. It is not necessary to review the history of the intervening years or to pass upon the contentions of the parties with respect to responsibility for delay. The contract is still to be interpreted according to its true intent, although altered conditions may have varied the form of fulfilment."

In *Walker Realty Company vs. American Surety Company*, 60 Utah, 435, in the opinion by Thurman, J., on page 452, it is said:

> "The court also indorses as correct the proposition advanced by defendant to the effect that, in order to arrive at the intent of the parties to a contract, we must consider its terms in the light of conditions as they existed at the time the contract was entered into and not in the light of subsequent conditions, which perhaps were not within the contemplation of the parties when they executed the contract. We believe this rule is likewise elementary except in cases where public interests are involved, in which case the parties are presumed to contract in contemplation of the power of the state to modify or abrogate the contract entirely, if necessary for the public welfare by reason of changed conditions."

See also: Beckwith vs. Howard, 6 R. I., 1, 11.
Hubbard vs. Toledo, *supra*, 401.

VI

The furnishing of hydraulic power to a private corporation such as appellee, is a private as distinguished from a governmental function.

Kaukauna Water Power Co. vs. Canal Co., *supra*.
Buckingham vs. Smith, *supra*.
Varick vs. Smith, 5 Paige (N. Y.) 137.

The state in creating the canals and in taking property for that purpose assumed to do so for a governmental or a public purpose, namely, for the purposes of navigation. For the state now to be compelled to devote these canals for the primary purpose of furnishing hy-

draulic power are in effect devoting the lands taken by it for a public purpose to a private purpose, thus violating a duty owing by it to the public.

Kaukauna Water Power Co. vs. Canal Co., *supra*.

Illinois Central R. Co. vs. Illinois, 146 U. S. 387.

Rossmiller vs. State, 114 Wis. 169.

Bradshaw vs. Mill Co., 52 Minn. 59.

While appellee is now manufacturing electricity, there is nothing in any of the leases requiring the water power to be so used and there is no prohibition against a change of use.

In the case of *Buckingham vs. Smith*, *supra*, the Ohio Supreme Court, with reference thereto, said:

> "We know of no instances in which it has, or can be taken, even by state authority, for the mere purpose of raising a revenue by resale, or otherwise; and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum et tuum*, and annihilate them forever, at the pleasure of the state."

The state should not be required to maintain canals at a sacrifice for the exclusive benefit of the lessees of water.

State ex rel. vs. Board of Public Works, *supra*.

The question here for consideration is the vested legal right of the appellee. Buildings have been constructed and expenditures have been made by the appel-

lee which might naturally lead, between private individuals, to a consideration in favor of preserving the water privileges for the appellee to prevent its loss, but the courts will not use discretionary power to give relief for loss which will result to the appellee as the result of the Acts of the legislature in abandoning the canal. The appellee, if it desired to have saved itself from the resulting loss, should have considered the broad powers of the state as shown by the decisions of the courts in interpreting the statutes of Ohio authorizing the leases which have granted to the appellee the rights which it has in the past been enjoying.

VII

Appellee claims that at the time of the making of the Law lease and of the subsequent leases owned by appellee, the canal, by reason of non-use, had been abandoned and thereby all of the water in the canal became surplus water. It will be observed that the bill of complaint (Rec. 5) alleges and the answer (Rec. 30, 37, 43, 50) admits that prior to 1894 navigation on the canal had almost disappeared, and that from 1894 to 1900 navigation on the canal had entirely ceased as a business. Such non-user, however, is distinguished from abandonment; non-user does not create abandonment.

Adams vs. Hodgkins, 109 Me. 361.

Abandonment is a matter of both intention and act; non-user is not of itself abandonment. Whether the act of a party constitutes abandonment depends on intent. Absence from and non-user of property do not prove an

intention to abandon, although conduct of that kind may continue unexplained for such length of time as not to be consistent with any other hypothesis.

Farmers' Irr. Dist. vs. Frank, 72 Neb. 136.

In order to constitute an abandonment of a water right there must be an intent to abandon coupled with some act of relinquishment by which the intent is carried out.

Ranch Co. vs. Argile, 28 Utah 398.

The claim of appellee, therefore, that the state was acting in its proprietary capacity is without force because the board of public works in the making of the leases could not bind the state in its proprietary capacity, for the authority of the board of public works to execute the leases was shown by and limited to the provisions of the Act of March 23, 1840, 38 O. L. 87, with slight amendment, immaterial here, by Sec. 14009, Ohio General Code.

This claim of appellee, it seems to us, is inconsistent with their claim that the Act of April 9, 1902, 95 O. L. 118, Section 14218, General Code, declaring the public policy of the state, that the Miami and Erie Canal should be maintained as a canal has a bearing on this case in favor of establishing vested rights in the appellee; the passage of this Act clearly proves that on April 9, 1902, there had been no abandonment of the canal as a canal. Furthermore, who shall say that this canal was ever abandoned for canal purposes until 1927 when the legislature acted for that purpose? The legislature was the sole authority to abandon the canal, and until it, by legislative enactment, made provision therefor, there could

be no abandonment. Until the Act of May 11, 1927, became effective, the canal was available, and its use could have been resumed at any time. This court is not unfamiliar with recent discussion of plans for a canal from Lake Erie to the Ohio River. As late as 1923 the legislature of Ohio passed House Joint Resolution No. 32, 110 Ohio Laws 638, appropriating money to investigate the matter of water transportation in and about the Great Lakes.

VIII AND XI

The City of Toledo acquired that part of the canal from the Maumee River side-cut northerly, (Lineal Part One) pursuant to the Act of January 22, 1920, 108 Ohio Laws, Part 2, page 1138, Section 14188-15, *et seq.*, of the Ohio General Code. This Act provided for the sale to the City of Toledo of said portion of the canal and in Section 6 thereof authorized a deed in fee simple to the City of Toledo of said property "but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both and the rights of said owners to a renewal of said existing leases; * * *" and in Section 7 it was provided that in case of a lease there should be leased to the City of Toledo said lands "excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, and the rights of said owners to a renewal of said existing leases, and in case the state's lessees are at any time *under the terms of this Act* deprived of their water privileges the City of Toledo shall pay such lessees a fair compensation for the loss of the water to which

they are entitled * * *." The appellee was one of the lessees referred to in the above quoted portions of said Act. The appellee now claims that said Act and the deed (Exhibit 15, Rec. 133) executed in pursuance thereof created a contract between it and the State of Ohio, the terms of which are impaired by the enforcement of the Act of May 11, 1927.

We deny the claim that there was any contract existing between the State of Ohio and the appellee in relation to the payment of compensation for any loss sustained by virtue of the abandonment of the canal by the Act of May 11, 1927. The state had not, by the Act of January 22, 1920, agreed in any way to protect any rights of any of the lessees. It simply required the City of Toledo, as a condition to acquiring that part of the canal, Lineal Part One, to pay compensation to the lessees for the value of their rights if the City of Toledo in accordance with the provisions of the Act of January 22, 1920, deprived the lessees of their rights under their leases. The language used comes far from creating any liability or obligation on the part of the state to the appellee. The obligation was from the City of Toledo to the appellee conditioned upon the City of Toledo's depriving, "under the terms of this Act" (Act of January 22, 1920) appellee of its rights under leases. It is clear that the state reserved the right unto itself at a future time to declare the abandonment of Lineal Part One and cancel the leases of the lessees having rights therein. The Act provided "and in case the state's lessees are at any time, *under the terms of this Act*, deprived of their water privileges the City of Toledo shall pay such lessees a fair

compensation," etc. Why did the legislature limit the obligation of the City of Toledo to pay for the loss of water to which the lessees would be entitled to receive, to such rights as lessees were *deprived of under the terms of the Act of January* 22, 1920? The claim is made that by virtue of the decision and judgment in the case of *Maumee Valley Electric Co. vs. City of Toledo*, 13 Fed. (2nd) 98, it was adjudged that the state had made a contract for the use and benefit of appellee. The effect of the decision in that case was not determinative of any such question. First of all, neither the State of Ohio nor any of the other appellants, except the City of Toledo, were parties to that case, and secondly, that case dealt with the provisions of the Act of January 22, 1920, insofar as it affected the right of the City of Toledo. The fact was that notwithstanding the express provisions of Sections 6 and 7 of said Act, requiring it to pay compensation to the owners of existing leases for any loss sustained by them if under the terms of said Act they were deprived of their water privileges, the City of Toledo was intending to deprive appellee of its water privileges without compensation, in fact it denied that said lessees were entitled to compensation. We think it clear that the Court of Appeals in its opinion took it for granted that the state had a right to abandon the canal, but the effect of the decision is that the reservations in the deed to the City of Toledo, and the above quoted provisions of Sections 6 and 7 of the Act, made it a condition that the *City of Toledo* could not, under the terms of the Act of January 22, 1920, deprive the appellee of the right to the use of water under its leases without first making compensation.

It was said in the opinion by Knappen, C. J.:

> "The Legislature had, in our opinion, the undoubted power to impose upon the city the conditions in favor of the plaintiff as we have construed them."

And further:

> "The city, by the acceptance of the deed from the state upon the terms and conditions contained in the legislative act, has effectively contracted to respect plaintiff's interests."

The conditions and restrictions resulting from the reservations in the deed from the state to the City of Toledo involved in the decision of the case last above referred to, have no application to the case at bar and no restrictions, reservations or conditions were attached to the Act of May 11, 1927, above referred to.

The City of Toledo is no longer asserting any right to withdraw water from that part of the canal which it acquired in pursuance to the Act of January 22, 1920, until it has compensated the holders of leases. Appellee is not contending that the City of Toledo is making any threat to withdraw water from the canal nor is the City of Toledo in any way attempting to deprive the appellee of the loss of its water pursuant to the provisions of any of the leases. Appellants assert that the State of Ohio has a right to abandon any part of the canal which it still owns and which it intends to devote to public highway purposes.

The Act of January 22, 1920, expressly provided that the same should not be construed as granting the lessees any rights in addition to those granted them in existing leases. See Section 7:

> "And provided further that this Act shall not be construed as granting the lessees any rights in addition to those in their existing leases."

There was no agreement on the part of the city to assume any obligation or agreement toward the appellee unless it would, *pursuant to the Act of January* 22, 1920, deprive appellee of its rights under its leases. The decision in the case of *Maumee Valley Electric Company vs. City of Toledo, supra*, goes no further.

The Act of January 22, 1920, is distinguished from the Abandonment Act in the *Hubbard* case in that the legislature thereby imposed upon Toledo the obligation to compensate the holders of water leases for their rights in the event it should, pursuant to any right granted by said Act, withdraw the water from the canal, whereas, no such requirement was made by the abandonment Act considered in the *Hubbard* case.

IX

The maintenance of the claim of appellee with regard to the Purdy lease would not entitle appellee to an injunction in the case at bar, because the Purdy lease affects the right to use the water on the southerly side of the Maumee River, which would not be affected by the abandonment of the canal pursuant to the Act of May 11, 1927, but as appellee makes certain claims with reference thereto, we will here consider the question.

The rights of the appellee under the Purdy lease do not differ from the other leases in respect to the right of the state to terminate the same by the abandonment of the canal.

By Section 8 of the Act of the legislature of Ohio, passed February 4, 1825, 23 Ohio Laws 50, the canal commissioners were authorized "to enter upon and take possession of and use all and singular any lands, waters, streams and materials necessary for the prosecution of the improvements intended by this Act."

The Act further provided:

> "* * * that in case any lands, waters, streams or materials, taken and appropriated for any of the purposes aforesaid, shall not be given or granted to this state, it shall be the duty of the canal commissioners, on application being made to them by the owner or owners of any such lands, waters, streams or materials, to appoint by writing not less than three nor more than five discreet, disinterested persons as appraisers * * *, and it shall be the duty of said appraisers, or a majority of them, to make a just and equitable estimate and appraisal of the loss or damage, if any, over and above the benefit and advantage to the respective owners and proprietors, or parties interested in the premises * * *, and the canal commissioners shall pay the damages so to be assessed and appraised, and the fee simple of the premises so appropriated shall be vested in this state."

Pursuant to the authority thus granted, the canal commissioners, in the construction of the canal, proceeded in some cases by negotiating with the owners of property and riparian rights and in other cases by appropriating the property or rights and afterwards settling the claims of the owners thereof in the manner provided by the legislature above set out. The effect of this legislation was outlined by the Supreme Court of Ohio in the case of *Ohio ex rel. vs. Railway Company*,

53 O. S. 189, which holds that the mere occupation of the land by the state was a seizure and appropriation thereof, and that the state thereby took the title to the lands, leaving to the former owners simply a claim for compensation.

In the case of Purdy there was no property necessary to be taken by the canal commissioners. The only claim which Purdy asserted was based upon his riparian rights.

In addition to the authority granted by the above general statutes, the legislature, on March 12, 1845, 43 Ohio Laws, p 453, passed a joint resolution relative to the adjustment of the claim of Purdy. In substance it provides:

(a) Authority for the board of public works to negotiate and purchase from Purdy "*the right to which he may be entitled as riparian proprietor*, to the water which the state may want, flowing in the Miami River at the Grand Rapids."

(b) To pay for the same in surplus water of said river, in case Purdy should elect to receive his compensation in that form. The exact language of the resolution in this respect is as follows:

> "And in case the said Purdy shall desire to receive the price agreed on, in whole or in part, in the surplus water of said river, the board shall construct a side-cut from the pool above the State Dam sufficiently large for the purposes of navigation and to carry the water to the mills of said Purdy, with a suitable guard lock therein * * *. And the board may sell to said Purdy, to be taken through such side-cut, so much water as shall be agreed on, so that there shall at all times remain to the state water enough for her purposes of

> navigation, and to supply the hydraulic power, which she shall have rented; and any balance due to said Purdy, by said agreement, shall be paid as damages to others are paid by existing laws for injuries occasioned by construction of the public works."

(c) The resolution further provided for arbitrators to determine the quantity and value of the water to be given to Purdy as part compensation under said agreement in case Purdy and the board of public works were unable to agree thereon.

(d) Purdy was required to "execute a conveyance in fee, in the same manner as by law deeds of lands are made, of his interest in the water so purchased of him."

(e) The board was authorized to "execute to him a lease or other conveyance in fee, of the quantity of water to be conveyed to him free of rent, *in their usual form of lease or conveyance.*"

The proposed settlement with Purdy did not contemplate all of his possible claims, for the resolution closes with the following words:

> "And if the said Purdy shall suppose that he has a legal claim to compensation from the state for the obstruction of water from the river necessary for the purposes of navigation in her canal, the right to apply to the Supreme Court for the settlement of the question of the legality of such claim, in manner as is provided by resolution of this session for certain claimants on the Miami River, shall remain unimpaired to said Purdy."

It is clear that the lease which the board was authorized to make to Purdy was no different from any other lease which the board might make to anyone. Such

leases might have been either for a term of years or in perpetuity, except that under the circumstances in the Purdy case there was no annual rent provided for. This lease was not forced upon Mr. Purdy, but was taken by him voluntarily as part of the consideration for his riparian rights. It gives to him no greater right than that acquired by any other lessee of the state. Whatever right remained in the state to terminate leases by the abandonment of the canal was as inherently a part of the Purdy lease as of any other lease made by the state.

The particular claim of the appellee with reference to the Purdy lease is based upon the wording of the contract which was entered into between the board of public works and Purdy pursuant to the foregoing resolution of the General Assembly.

This agreement is found in the record as Exhibit No. 7, (Rec. 101). In substance the agreement consists of the following:

(a) A recital as to the erection of a dam across the Maumee River at the head of the Grand Rapids.

(b) A conveyance by Purdy in the form and language of a quit claim deed of "his right and interest as riparian proprietor to the use of the water in the Maumee River flowing over the Grand Rapids, over and alongside of his property in and near the Town of Gilead in Wood County, Ohio. That is so much thereof as said state may choose to divert and lease for hydraulic purposes." The deed contained a proviso in the following language:

> "Provided that said Purdy reserves and excepts from said conveyance and reserves to his own use so much of said water to be taken from the pool of the dam aforesaid through the canal

herein described, in any quantity he may desire, during the seasons that the canal is not navigable, until," etc. (Then follow certain limitations as to the amount of water which Purdy was to take from the dam depending upon the height of water in the dam at the time.)

(c) An agreement by the state

"to locate and construct a public navigable canal from the pool aforesaid on the south shore of the river, to the head of said Purdy's mill race in the Town of Gilead and through the same to a point two hundred yards below the head thereof thirty feet wide at the bottom and four and one-half feet deep below the top of the dam, with a descent at the bottom of six inches in the whole length, with a slope in the banks of one foot nine inches base to one foot perpendicular, and construct in said canal a guard gate and other fixtures for the security of the navigation and machinery connected with the canal."

(d) A conveyance of water to Purdy, which is in the following language:

"* * * and the State of Ohio conveys and guarantees to said Purdy and his assigns forever, the right to receive through said canal and use on his own land, the foregoing reserved quantity of water."

Based upon the language used in this agreement, it is claimed by the appellee that the Purdy lease stands upon a different basis than that of other leases. This claim is predicated upon the so-called reservation contained in the proviso above set out. Aside from the proviso in question, there are found in the instrument all of the things contemplated by the resolution of the General

Assembly, to-wit, a quit claim deed by Purdy of his riparian rights; a conveyance to Purdy by the state of the use of water from the dam and canal. We call attention to the fact that the resolution under which the board was acting did not contemplate or provide for any reservation on the part of Purdy, but only for a conveyance by Purdy of his riparian rights and a conveyance by the state of the use of the water.

An important element in the transaction is the fact that the so-called reservation does not even purport to be an "exception" or even a "reservation" of any part of that which Purdy was conveying to the state. On the contrary, it purports to be a "reservation" of a water right produced by the construction of the dam, canal and locks which the state by the terms of the instrument itself was agreeing to construct.

It is also an important element in the situation that the only conveyance by Purdy to the state was of riparian rights. No real estate or other property was involved. After the state has abandoned the canal all of the rights acquired by the state from Purdy will still be there and may revert to his successors in title.

Any one of the foregoing propositions furnishes a complete answer to the claim of the appellee herein so far as the Purdy lease is concerned.

On the proposition that the so-called reservation in the Purdy transaction was neither an exception nor reservation, but merely a stipulation as to the consideration to be paid to Purdy, we call the court's attention to the case of *York Haven Water & Power Company vs. York Haven Paper Company*, decided by the Circuit Court of Appeals, 3rd Circuit, 201 Fed. 270. In this case

the court, in referring to an attempted reservation similar to the one involved here, said at page 276:

> "It was with reference to this artificial water power thereafter to be created that the reservation and its auxiliary covenants were made Clearly this was the creation of a right or interest which had no prior existence as such in the property conveyed. It was a new right or interest and was reserved as a rent or an easement might have been reserved. It was something that was created by and grew out of the transaction. The distinction is well illustrated in this very deed where the grantor 'excepts' a certain lot or parcel of land described by metes and bounds from the grant of the whole tract. The thing excepted was *in esse*, as is the coal or other minerals which are excepted from the grant of the land which they underlie, or the standing timber excepted from the land on which it grows. * * *
>
> We think, therefore, that no right of or title to property was retained by the Paper Company by the reservation contained in its deed to the Power Company. * * * The very existence, as well as the value of the interest reserved, rested in the obligation of the Power Company to construct the works and deliver and supply the water it had stored to the headgates of the Paper Company."

The language of the so-called reservation involved in that case was as follows:

> "Reserving also to the said York Haven Paper Company, its successors and assigns, a sufficient flow of water to enable the said York Haven Paper Company to develop three thousand horsepower for all time after the construction of a contemplated power plant by the said York Haven Water & Power Company, said supply of water to be furnished said York Haven Paper Company without cost or charge to it, by the said York Haven

> Water & Power Company and delivered at headgates to be constructed at the expense of the said Power Company in accordance with plans to be approved by the York Haven Paper Company."

The court, at page 275 of the opinion, said:

> "It is apparent that the distinction between an exception and a reservation here relied upon is vital and substantial, and the question whether the stipulation in the deed be one or the other, is to be determined, not technically or by what the parties have called it, but by what was the essential character and quality of the interest or right sought to be reserved."

At page 278 of the opinion the court uses the following significant language:

> "In the case at bar, the covenants are to supply and deliver at plaintiff's headgates so much water power *for all time*, and for all time the Power Company must itself refrain from using the water power created by its extensive and costly works until the water power stipulated for has been furnished to the plaintiff. A perpetual and continuing performance is of the very essence of the covenants, and involves an enormous outlay of money and continuous effort on the part of the defendant. We think that the court below should not impose upon itself the duty of enforcing through the indefinite future the performance of such a contract."

The lower court, in the above case, had granted a perpetual injunction restraining the power company from appropriating for use at any time for any purpose whatsoever any water in the forebay of the said power company necessary to allow a sufficient flow of water at the said headgates to develop three thousand horse-

power. The Circuit Court, at page 281 of the opinion, said:

> "We think the ends of justice and the equities of the case require a reversal of the decree below, and the dismissal of the bill without prejudice. And it is so ordered."

X

The Minor lease (Exhibit 8, Rec. 104) is involved in the case of *Kirk et al. vs. Providence Mill Company*, number 675 on the docket of this court. The Minor lease is distinguished from the leases (Exhibits 1 to 6) in the case at bar in that the Minor lease, similar to the Purdy lease, was executed in relation to an adjustment by the state in the appropriating of property for the purposes of the canal. The question of law involved is fully discussed in relation to the Purdy lease, but we desire to suggest that equities in favor of the Purdy and Minor leases would not entitle the appellee in the case at bar to an injunction on account of the leases (Exhibits 1-6, inclusive), because the canal could be discontinued at the site of the Providence Mill Company, Lock Number 9, and the water drained off at that point.

The appellee in the court below contended that the decision of the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company*, 114 O. S. 437, changed the rule as expressed in the cases of *Hubbard vs. Toledo*, *Fox vs. Cincinnati*, *Elevator Company vs. Cincinnati*, *State ex rel. vs. Board of Public Works*, and *Voight vs. Railroad Company*, and other pronouncements of the courts of Ohio holding that the use of the canal for hydraulic power was an incidental purpose, and that the State had a right to terminate

leases for surplus water by abandonment of the canal without liability to the holders of the leases.

In our analysis of the *Middletown* case we must consider the previous decisions of the Supreme Court of Ohio on the question here under consideration, and also the facts in that case.

In the case of *State ex rel. vs. Board of Public Works, supra*, a similar objection was raised as to a lease containing provision for the State to at any time resume the use of canal water leased for hydraulic purposes, in which it was specifically provided that the state should pay for lasting improvements put on the property by the lessee. The court held that the state had the right to terminate the lease and the lessees thereof were not entitled to compensation on the ground that the board of public works possessed no power to surrender the duty of performing the public trust committed to their charge by the statutes of the state, by failing, when the public policy of the state required, to resume the water of the canal whenever the same was needed for public use, untrammeled by any condition or any right of the lessee to prevent it, and that the terms and provisions of leases must correspond to the provisions of the Act of March 23, 1840.

Again, in the case of *Voight vs. Railroad Co., supra*, the law on the subject is set forth in the syllabus as follows:

> "Contracts made with the Board of Public Works or other agents of the state, for the use of the water of the canal, terminate with the abandonment of the use of the canal by the state and no action will lie against the state for damages resulting from such abandonment."

The facts disclose that the board of public works, in consideration of the owner of a certain grist mill granting to the state the right to construct a canal through his lands, agreed to enlarge and forever maintain a dam across the Hocking River above the grist mill so as to afford an ample supply of water both for the canal and for the mill. That canal, by an Act of the General Assembly of May 18, 1894, was abandoned for canal purposes and leased to the Columbus, Hocking Valley and Athens Railroad Company for the construction of a railroad. The owner of the lease at the time of the abandonment sought to enjoin the railway company from entering upon the lands purchased upon the ground that the abandonment of the canal would impair the contract made between the state and his predecessor in title, to whose right he had succeeded. While the court held the Act of Abandonment specifically provided that the railway company should compensate any such property holder, yet, on the question of the right and power of the General Assembly to abandon the canal and thereby terminate all contracts made by the board of public works or other agents of the state for the use of the water of the canal, the case was disposed of by the court on the ground that the state was under no obligation to keep up the canal for the purpose of navigation after the canal had become useless for such purpose and had been abandoned, and *that the agents of the state had no power to make a contract to so bind the state.*

The construction of the Act of March 23, 1840, by the *Hubbard, Fox and Elevator Company* cases was thus reaffirmed.

To hold as a matter of law that the General Assembly cannot abandon a canal for navigation purposes and direct that the lands shall thereafter be used for state highway purposes without first compensating lessees of surplus water, would require the impossible thing of assessing the value of a water right in perpetuity or require the state to forever keep up and maintain dams, canals, feeders, etc., at the expense of the people of Ohio for all time, irrespective of the loss thereby occasioned to the state.

This contention of the appellants was adopted by the Circuit Court of Appeals in the case of *Maumee Valley Electric Company vs. City of Toledo, supra*, in which there was a discussion of a number of Ohio cases; and with reference to this question at page 101 said:

> "Broadly stated, the city's defense is this: (a) Plaintiff's leases were only for surplus water, not needed for navigation purposes; (b) *the state had power at any time to abandon the canal for purposes of navigation*, and the Act of 1920 worked such abandonment; (c) there then remained no such thing as surplus water; • • •
>
> The abstract propositions numbered (a), (b), and (c), *supra*, as there generally stated, were applied to the facts existing in *Hubbard vs. Toledo*, 21 Ohio St. 379; *Elevator Co. vs. Cincinnati*, 30 Ohio St. 629, 643; *Fox vs. Cincinnati*, 33 Ohio St. 492; *Id.*, 104 U. S. 783, 26 L. Ed. 928; *Cincinnati vs. Rogers*, 16 Ohio App. 139; *Kaukauna Co. vs. Green Bay, etc., Canal*, 142 U. S. 254, 274, 12 S. Ct. 173, 35 L. Ed. 1004; and in denial of right of action by lessees of 'surplus' water because of abandonment by the state of one portion or another of the Miami & Erie Canal for navigation purposes."

The Circuit Court of Appeals assumed for the purposes of that case "that plaintiff could not prevent the cutting off by the state of plaintiff's water privileges even though the state was being put to no expense for maintaining the canal."

This interpretation by the Circuit Court of Appeals was after the decision of the Supreme Court of Ohio in the case of *State ex rel. vs. Middletown Hydraulic Company, supra*, which was considered and cited in the opinion (see page 102).

We must consider the *Middletown* case in the light of the rules of the Supreme Court of Ohio, which provide that the law of the case is stated in the syllabus which is required to be submitted to the judges before publication, but there is no such requirement as to the opinion of the judges. Rule VI, entered January, 1858, 5 O. S. vii; 73 O. S. x, Rule VI; 94 O. S. ix, Rule VI; *Baltimore & Ohio Railroad Company vs. Baillee*, 112 O. S. 567; *Railway Co. vs. Dittey*, 232 U. S. 587-589.

The *Middletown Hydraulic Company* case in order to overrule the *Hubbard, Fox, Elevator Company, State ex rel.*, and *Voight* cases, *supra*, no doubt would have expressly so stated, but the Supreme Court failed to make any statement to that effect. Neither the syllabus nor the opinion of Judge Robinson mentions the cases of *Hubbard, Fox, Elevator Company, State ex rel.*, or *Voight*, nor the principles of law thereby established. The syllabus of the case does not impliedly overrule any of the prior decisions above referred to; besides, out of a consideration of the decision of the Supreme Court of Ohio in *State ex rel vs. Edmondson*, 89 O. S. 107, and the

rules of the court and the *Baillee* case, *supra*, the syllabus of the *Middletown* case must be held to contain the law of the case restricted to the facts therein. Under these circumstances we point out the following points of difference between the earlier decisions of the Supreme Court of Ohio above referred to and the *Middletown Hydraulic Company* case.

First: In the *Middletown* case there had been no abandonment of the canal for either navigation or hydraulic purposes.

Second: The *Middletown* case was an action in *quo warranto* to determine by what right the hydraulic company was taking water from the Middletown feeder. The question of the right of the plaintiff upon the abandonment of the canal by the General Assembly was not involved.

Third: The "reservation" or "exception" involved in the *Middletown* case was of the use of the mill race and the water flowing through the same, of which the predecessor in title of the hydraulic company was in actual enjoyment at the time.

Fourth: The "reservation" or "exception" in the *Middletown* case was in the deed from the owner of the land to the State of Ohio, whereas, the alleged "reservation" or "exception" in the Purdy lease was in the lease or agreement from the State of Ohio to Purdy and not a part of a conveyance from Purdy to the State of Ohio.

From the facts in the *Middletown* case it appears that in 1824, when the state began the construction of the Miami canal, it found one Mr. Enoch in possession of a dam near the site selected for the state dam and a

mill race, by the use of which he was engaged in the operation of a mill. The state negotiated a contract with Enoch, under which it occupied his mill race with its feeder and head gates, in which a weir or gauge was placed "for the purpose of continuing to Mr. Enoch the use of the water as before the construction of the canal."

Mr. Enoch conveyed to the state by deed the lands which were occupied by the site of the canal and the towing paths, feeders, aqueducts, reservoirs, spoil banks and culverts connected therewith, and in that grant to the state inserted the following language:

> "All water privileges reserved to myself as to mill seats," etc.

There was no taking of the property of Enoch by the state, nor was there any conveyance to Enoch by the state of water rights. On the other hand Enoch voluntarily granted certain lands to the state, including the land upon which the mill race was located, and reserved from that conveyance the water power which he was then using. That water power never became the property of the state for it was never taken, appropriated or purchased by the state. The conclusion of the court in the *Middletown* case was that what the state acquired under the Enoch grant was a limited grant and a partial possession. The opinion is chiefly devoted to a discussion of the power of the canal commissioners to take such a limited grant or partial possession, and the determination of the case turned upon the decision of the court that it was possible and legal for the canal commissioners to take such a limited grant or partial possession.

It necessarily followed, therefore, that the successors in title to Enoch were entitled to take water from the feeder and that was the only question determined in the case. *It does not follow from the Middletown case that the state is obligated to maintain the dam or the feeder for the benefit of the successors of Enoch.*

In the particular paragraph of the opinion of Judge Robinson in that case, relied upon by counsel for the appellee, Judge Robinson is careful to say that:

> "* * * the rights of the state, as such proprietor, *in this particular property*, which have not heretofore been judicially determined,"

and which were to be determined then for the first time. To our minds this language shows that Judge Robinson had thoroughly in mind the previous decisions of the court and that he entertained no purpose of changing the rule so well established. Besides, as has been shown, Judge Robinson in writing the opinion had no power or authority to overrule any previous decision of the court nor to change the law as determined by the syllabus of the case.

The controlling point in the decision of the *Middletown* case was the fact that Enoch and his successors in title did not hold the rights there involved under any grant of any kind from the State of Ohio. However, if we should give to the opinion of Judge Robinson the effect of establishing the law of the case, we think he makes this point entirely clear and says at page 450 of the opinion:

> "We think it may be conceded, *notwithstanding the reservation from the grant*, that, if the occupancy by the state of this particular feeder and the land upon which it is located had been exclu-

> sive and in denial of the claimed rights of Abner Enoch, the occupancy by the state of this feeder would have amounted to an appropriation of Abner Enoch's lands and water rights and relegated him, as to remedy, to a recovery of the value of his property and water rights, but the State of Ohio during all this period, not only abstained from such occupancy as would appropriate the lands and water rights of Abner Enoch, but by its departmental construction affirmatively recognized his joint occupancy, so that the time, to this day, has not come when Abner Enoch, or his successors, could have the value of these property rights ascertained and compensation therefor awarded."

In the case of Purdy, the state did acquire from Purdy his riparian rights. He was afforded the opportunity of ascertaining and receiving compensation therefor. His compensation was determined and awarded to him and it consisted, not of the retention by him of something which he was already using, but of another and different use of water created by the construction of the dam and canal by the state. All of these considerations must be borne in mind in considering the effect of the statement so much relied upon by the appellee's counsel that the state is now engaged in the operation of a great power plant for the sale of power and water to private individuals and that the rights of the state, as such proprietor, are to be measured accordingly. No one is contending in this case that the appellee has not the right to continue to use the water from this canal during the valid term of each lease until abandonment of the canal for navigation purposes. That is the only obligation which the state assumed, and that obligation it is not un-

dertaking to avoid. What the state is doing is now asserting its right to discontinue this canal as a canal and to devote the property of the state occupied by it to another public purpose. The right of the state to subserve the best interest of the public in the use of the property of the state cannot be circumscribed by applying thereto rules which might apply to the affairs of private individuals, nor can its right to change the nature of the use of public property be denied for the benefit of a few private individuals or corporations.

We do not question the statement in the case of *Cleveland Terminal & Valley Railroad Company vs. State ex rel.*, 85 O. S. 251, quoted by Judge Robinson at page 448 of the opinion of the *Middletown* case, that where the state has granted and conveyed lands it will not be permitted to revoke such a grant made upon a valuable consideration which it retains. It does not, however, follow that because the state has granted to private individuals rights incident to a public use of state property that the state is thereby forever barred from abandoning the particular public use and devoting the property to another public use.

The *Middletown* case, because of the reservation or exception in the deed from Enoch to the state, restricted the nature of the title of the state to the lands thus conveyed to it; this feature of the case seemed to disturb Judge Jones and prompted his dissenting opinion because he thought that it was in conflict with the law laid down in the *Malone* case 34 O. S. 541. But the *Middletown* case did not affect nor involve the question of the power of the state to abandon her canals and devote the property to another public use. The Supreme Court of the State of Ohio has not changed the rule which has

existed for many years on that question, and the *Middletown* case affords no justification whatever for changing a proposition of law so thoroughly settled by the Supreme Court of the State of Ohio and recognized so clearly by the Supreme Court of the United States.

The District Court (Rec. 174) recognized that the principles announced in the *Hubbard, Elevator Company, Fox, State ex rel. vs. Board of Public Works,* and *Voight* cases had become the established law of Ohio. But held that thereafter the position of the state had changed from that of operating the canal as a navigable highway to the operation of a power plant for the sale of power and water to the public; that the contracts under consideration must be viewed in the light of changed and altered circumstances and that this change may call for a different solution if the altered or changed conditions warranted. The court seems to indicate that the *Middletown* case calls for a different rule of law than that established by the cases above referred to. While we believe that it is beyond doubt that the *Middletown* case did not attempt to change the established law of Ohio, still this court ought not say that the law of Ohio established for sixty years can be so set aside. The rule of this court on that subject, we think, is well stated by Mr. Chief Justice Waite in the case of *Douglass vs. Pike County, Missouri, supra.* We quote from the opinion on page 686, as follows:

> "As a rule, we treat the construction which the highest court of a state has given a statute of the state as part of the statute, and govern ourselves accordingly; but where different constructions have been given to the same statute at different times, *we have never felt ourselves bound to follow the latest decisions, if thereby contract rights*

which have accrued under earlier rulings will be injuriously affected."

This court in *Harding vs. Jordan*, 140 U. S. 371, had under consideration a case where there had been an established law of the State of Illinois. A recent decision seemed to have cast doubt upon the force of the earlier decisions. On this subject this court, through Mr. Justice Bradley, said on pages 384-385:

> "If it were not for the decision of the Supreme Court of that state in the case of *Trustees of Schools vs. Schroll*, 120 Ill. 509, 9 West. Rep. 741, we should not have the slightest hesitation on the subject. And we cannot divest ourselves of the impression that the opinion of the court in that case on the subject in hand is anomalous, and opposed to the entire course of previous decisions in the state. It is our judgment that the law of Illinois in this regard is the common law, and nothing else; • • •.
>
> "That the common law is the true and only law of Illinois on the subject of land titles, • • • is so clearly shown by the statutes, and by the whole course of the decisions of the Supreme Court of that state, that it hardly needs any argument to support the proposition."

After a review of the earlier Illinois cases this court disregarded the later decision and decided the case upon the law of the state, established by a long line of earlier cases.

CONCLUSION

It is apparent from the statement of this court in the case of *Calder vs. Michigan*, 218 U. S. 591-598, that activities of officials of the City of Toledo and Lucas County, Ohio, in advocating the passage of the Act of May 11, 1927, does not entitle the appellee to any ad-

vantage nor does it detract from the force and effect of said legislation.

We have not here urged that the question here presented might become moot if the appellee had pursued its application (Exhibit 19, Rec. 140) for a renewal of the leases, by requiring the officers of the state to comply with the provisions thereof, if enforceable, in the event the officers of the state should be required to receive bids so as to determine the highest responsible bidder and thus give the lessee the option of taking the lease at the rent to be paid by such highest responsible bidder (Rec. 72, 80, 86, 92, 99).

It seems to us unnecessary to give any attention to this detail, for the law of Ohio clearly entitles appellants to a reversal of the judgment of the District Court and to a dismissal of the bill of complaint.

Respectfully submitted,

GILBERT BETTMAN,
Attorney General of Ohio.
L. F. LAYLIN,
JOSEPH A. GOLDOWN,
Solicitors for Harry J. Kirk.
LEROY W. HUNT,
Prosecuting Attorney, Lucas County,
Solicitor for Lucas County Commissioners.
GEORGE W. RITTER,
Director of Law of Toledo, Ohio.
MARTIN S. DODD,
DUDLEY F. SMITH,
Solicitors for the City of Toledo.
GEORGE W. RITTER,
Solicitor for the Villages of Maumee and Waterville, Ohio.

APPENDIX

I

Act of March 23, 1840. 38 Ohio Laws 87.

Swan's Statutes of Ohio, 1841, pages 174 to 200.

Sections 14009 to 14013, inclusive, of the General Code of Ohio, 1910 Edition.

* * *

"Sec. 20. Whenever in the opinion of the Board of Public Works there shall be surplus water in either of the canals, or in the feeders or at the dams erected for the purpose of supplying either of said canals with water, or for the purpose of improving the navigation of any river, and constructed at the expense of the state, over and above the quantity of water which may be required for the purpose of navigation, the said commissioner may order such surplus water, and any lands granted to, or purchased by the state for the purpose of using the same, or such part thereof as they may deem expedient, to be sold for hydraulic purposes, subject to such conditions and reservations as they may consider necessary and proper, either in perpetuity, or for a limited number of years, for a certain annual rent or otherwise, as they may deem most beneficial for the interests of the state.

"Sec. 21. The provisions of the foregoing section shall extend to and include the water passing around locks from one level to another, on either of the canals of this state.

"Sec. 22. No hydraulic power, nor right to the use of any water, shall be sold, leased or conveyed, except

such as shall accrue from the surplus water of the canal, feeders or dams, or from the water passing around any lock, after supplying the full quantity necessary for the purposes of navigation.

"Sec. 23. Every lease, grant or conveyance of water power, shall contain a reservation and condition that the state or its authorized agents may at any time resume the privilege or right to the use of water, or any portion thereof, whenever it may be deemed necessary for the purpose of navigation, or whenever its use for hydraulic purposes shall be found in any manner to interfere with and injuriously affect the navigation of either of the canals, feeders or streams from which the water shall be taken for such hydraulic purposes; and whenever such privilege shall be resumed, in whole or in part, the sum paid therefor, or the rent reserved, or such reasonable portion thereof as shall be determined upon, agreeably to the conditions and stipulations of the lease or deed of conveyance aforesaid, shall be refunded, or remitted to the purchaser or lessee, his heirs or assigns."

* * *

II

Act of March 21, 1917, 107 Ohio Laws 418, Sec. 14009 of the General Code of Ohio.

"Sec. 1. That section 14009 of the General Code be amended to read as follows:

Sec. 14009. Whenever, in the opinion of the superintendent of public works, there shall be any surplus water in any of the state canals, or in any of the feeders, or reservoirs, or at any dams created by the state for

the purpose of supplying any of said canals with water, or erected for improving the navigation of any river, over and above the quantity of water which may be required for the purpose of navigation, said superintendent of public works may sell or lease the right to use such surplus water for hydraulic or other purposes, for any term not exceeding twenty-five years for a certain annual rental, or otherwise, as he may deem most beneficial for the interests of the state, subject to such conditions, reservations and restrictions as he may deem necessary and proper. All rentals shall be fixed by the superintendent of public works with the approval of the governor and attorney general.

Provided, however, that nothing herein contained shall be so construed as to authorize the superintendent of public works to sell or lease the right to use water at any time for any purpose or to such an extent as to prejudice, abrogate or supersede any of the water rights heretofore granted by the state to the City of Akron by an act entitled 'An act to provide for granting to the City of Akron the right to use and occupy certain waters and lands of the state for water works and park purposes' and being sections 14203-1, 14203-2 and 14203-3 of the General Code.

Sec. 2. That said original section 14009 of the General Code be, and the same is hereby repealed."

III

Act of April 9, 1902—95 Ohio Laws 118-120.

Vol. 1 Bates Annotated Ohio Statutes, 4 ed., pages 189-190.

"Sec. 2. That all boats hereafter built for use upon either of said lines of canal for freight transportation shall be paid for by the state at their then true value in money if, at any time in the future, the policy of the state shall be changed by abandonment of either or both of said lines of canal so as to make such boats useless for transportation purposes."

IV

Act of January 22, 1920, 108 Ohio Laws Part 2, 1138.

"Sec. 6. In case the City of Toledo signifies its intention to purchase said property, the governor is hereby authorized, as soon as the purchase price for said canal property has been paid into the state treasury, to execute a deed conveying said property in fee simple to the City of Toledo, Lucas County, Ohio, but excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, and the rights of said owners to a renewal of said existing lease, which deed before delivery shall first be approved by the attorney general."

"Sec. 7. In case the said City of Toledo by resolution of its council, shall signify its preference for a lease of said canal property, the superintendent of public works, subject to the approval of the governor and attorney general, is hereby authorized to execute and deliver to the said City of Toledo, a lease conveying to said city all the right, title, and interest of the State of Ohio in and to said abandoned canal property, either in perpetuity or for a term of years, excepting therefrom and subject to the rights of owners of existing leases of either lands or water or both, and the rights of said owners to

a renewal of said existing leases, and in case the state's lessees are at any time, under the terms of this act, deprived of their water privileges, the City of Toledo shall pay such lessees a fair compensation for the loss of the water to which they are entitled, and in case the amount of compensation cannot mutually be agreed upon, the City of Toledo shall proceed under the provisions of the General Code, to condemn the rights of such lessees for the use of said municipality; provided, however, that no new leases shall be executed for either water or land rights upon any portion of the canal property described in Section 1 hereof during the three-year period referred to in Section 5 hereof; and provided further, that this act shall not be construed as granting the lessees any rights in addition to those granted them in their existing leases."

V

Act of May 11, 1927, 112 Ohio Laws 360-363, Sections 14178 to 14178-12, General Code of Ohio.

Sec. 14178. Portion of Miami and Erie Canal abandoned; description.

"Sec. 1. That the portion of the Miami and Erie Canal in Lucas County, Ohio, that is described as follows, be, and the same is hereby abandoned for both canal and hydraulic purposes: Commencing at a point just below the head of the Maumee side-cut near Maumee, Ohio, thence southwesterly over and along said Miami and Erie Canal, including the full width of the bed and banks thereof, as defined by Buchanan's survey, to a point where said canal joins with the Maumee River, on the

westerly side thereof, in Providence Township, Lucas County, Ohio."

Sec. 14178-1. State of Ohio reserves title to all lands and waters.

"Sec. 2. The State of Ohio reserves unto itself, the title to all lands and waters to which it is entitled under the various acts, providing for the construction of the Miami and Erie Canal and all lands now occupied by any part of the said Miami and Erie Canal, including all lands used for lock houses, waste ways or for other purposes and now the property of the State of Ohio."

Sec. 14178-2. Lands to be held for state in fee simple.

"Sec. 3. So much of said lands as were used and occupied by the Miami and Erie Canal shall be forever held for the State of Ohio in fee simple, and held by the state for the purpose of constructing upon the said lands, a highway, to be erected, constructed and improved at such time or times as the State of Ohio may hereafter, either by legislative enactment, or otherwise, find proper and convenient."

Sec. 14178-3. When existing leases shall become null and void.

"Sec. 4. All leases heretofore granted to any person, firm or corporation, for canal or hydraulic purposes on that part of the Miami and Erie Canal described in Section 1 of this Act shall become and be null and void on and after sixty days from the taking effect of this Act, and all other leases for lands heretofore granted upon such portion of the canal shall be terminated according to the terms of this Act as the same can be legally done."

Sec. 14178-4. Abandoned portion under supervision of state highway director.

"Sec. 5. The abandoned portion of said canal shall be under the supervision and control of the state highway director, to be devoted to highway and park uses and purposes as herein provided, and the director of highways of the State of Ohio is hereby authorized to, and he shall, within sixty days from the taking effect of this Act, drain the water of said abandoned portion and prevent the water of the Maumee River from flowing into or through said abandoned part of said canal."

Sec. 14178-5. Surveys and maps to be made.

"Sec. 6. As soon as practicable, after this Act goes into effect, the director of highways of the State of Ohio shall cause surveys to be made of the canal property herein abandoned, together with maps and plats of the same, and of all lands used in connection with that portion of the Miami and Erie Canal, hereby abandoned, belonging to the State of Ohio, adjacent thereto, and file a copy thereof with the governor."

Sec. 14178-6. Making of plat or plan.

"Sec. 7. The director of highways is further directed to make a plat or plan, showing the highway, its length, grades and width of so much of the canal property as may be used for such highway purposes, and all other lands adjacent thereto that may be leased for other purposes."

Sec. 14178-7. Use of lands before highway is constructed and improved.

"Sec. 8. Until said highway shall be constructed and improved, no portion of the lands within the plat or plan showing such highway shall be leased for any pur-

pose whatever, but until the State of Ohio shall construct and improve said lands for a highway, all municipal corporations through which said highway shall pass when completed, and the commissioners of Lucas County, Ohio, shall be permitted to use said canal lands for public purposes only, without compensation."

Sec. 14178-8. Leasing of adjacent lands; manner.

"Sec. 9. All other lands which may be shown on said plat adjacent to said highway and which will not be used for highway purposes may be leased under the direction of the director of highways, in the following manner:

The said director of highways shall cause said lands, not to be used for said highways, to be appraised and a report of said appraisement filed in the office of the governor, and one copy left in the office of the director of highways.

After said lands are so appraised, and upon application therefor, the lands not needed or required within said highway may be leased to any applicant for a period not to exceed fifteen years, and with the right of renewal for an additional fifteen years, upon a rental equal to six per cent per annum upon the value of the appraisement so made, and at the end of fifteen years, said lands shall be reappraised and likewise leased to such applicant.

Provided, however, that if any municipal corporation, Lucas County, township, or other taxing district desires to lease any portion of said lands not required for said highway purposes, the same shall be leased to such taxing district upon a rental of four per cent per annum.

Said application shall be made in writing, upon

forms provided for that purpose, and shall clearly describe the lands covered in said application, and shall state the term of years for which such lease is desired, and shall be signed by a public officer, duly authorized by the public authorities of the city, village, or other political subdivision making said application, and when the same shall be desired by any political subdivision.

Before granting any lease to any private individual, notice of the filing of such application shall be given to the public official of any municipal corporation, county, township, or other political subdivision in which said lands are located.

If, within thirty (30) days after such notice such officer of the political subdivision makes no application to lease said lands, the same may be leased to private persons, firms or corporations, and such application made by such private persons, firm or corporation shall be made in writing upon forms provided for that purpose, describing the lands covered in the application, the term of years for which the lease is desired, and be signed by such person, firm or corporation, and filed in the office of the director of highways of the State of Ohio.

In the event that any leases granted herein are renewed at the expiration thereof, the same shall provide for a reappraisement by proper state authorities, upon the expiration of each fifteen-year period, and the rate of rental upon such new appraisement shall be made in the same manner as the original appraisement."

Sec. 14178-9. Right to remove bridges, to grade and construct roads and streets.

"Sec. 10. The county commissioners of Lucas County, the council or other legislative body of any mu-

nicipality or township through which said abandoned canal passes, shall have, and are hereby granted, the right to remove all existing bridges, crossing said abandoned portion of said canal over which county roads, city or village streets or township roads pass, and to grade and to construct such roads and streets across the channel of said abandoned portion by necessary fills and grades in the channel thereof and to such grade as shall be approved by the director of highways, and the county commissioners of Lucas County are authorized to drain the water of said abandoned portion, and to prevent the water from the river from flowing into or through said abandoned part of said canal, but reserving all rights of the State of Ohio across said roadways for any and all purposes said state or its grantees may hereafter desire to use said roadway, not in conflict therewith."

Sec. 14178-10. Sale prohibited; exception.

"Sec. 11. No portion of the canal lands and lands adjacent thereto and herein abandoned shall ever be sold, except by specific authority of the General Assembly of Ohio."

Sec. 14178-11. Defining term highway director.

"Sec. 12. The term highway director, as used herein, shall be construed to mean any officer, commission, board or department that may be established by law for the control of public highways."

Sec. 14178-12. Repealing section.

"Sec. 13. That all Acts or parts of Acts in conflict with this Act be, and the same are hereby repealed."

IN THE

Supreme Court of the United States

No. 674

October Term, 1928

HARRY J. KIRK ET AL.,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division

REPLY BRIEF ON BEHALF OF APPELLANTS

GILBERT BETTMAN, Columbus, Ohio,
Attorney General of Ohio,
L. F. LAYLIN, Columbus, Ohio,
JOSEPH A. GODOWN, Columbus, Ohio,
Solicitors for Harry J. Kirk.
LEROY W. HUNT, Toledo, Ohio,
Prosecuting Attorney, Lucas County,
Solicitor for Lucas County Commissioners.
GEORGE W. RITTER, Toledo, Ohio,
Director of Law of Toledo, Ohio,
MARTIN S. DODD, Toledo, Ohio,
DUDLEY F. SMITH, Toledo, Ohio,
Solicitors for the City of Toledo.
GEORGE W. RITTER, Toledo, Ohio,
Solicitor for the Villages of Maumee and Waterville, Ohio.

J60030

INDEX.

	Page
Reply to Appellee's Arguments	1
Provisions of renewal of leases	2
Supplemental Law lease not entitled to renewal	2
Method open to appellee for renewal if it had such right	2
Hubbard vs. Toledo, 21 O. S., and other like cases controlling under decision in Walsh vs. Railway Company, 176 U. S. 474	2
Cleveland, etc., Railway Company vs. Ohio ex rel., 85 O. S. 251, distinguished	3
Agreements of lease valid until abandonment of canal	3
Portion of canal in Middletown case had not been abandoned	4
Acts of 1898 and 1902 do not add to right in leases	4
Act of 1902 did not enlarge powers of board of public works	5
Provisions in leases as to expenses do not cover state's expense on canals	5
Further reasons for abandonment of canal	6
Act of January, 1920, not a ratification of appellee's leases	6
No moral obligation to appellee on part of the state	7
State did not acquire title to water in fee simple	8
Water can be taken only for public purpose	8
Question not in Middletown case	8
No obligation to compensate lessees of water power on abandonment even if expressly contained in leases	9
Lease of water power merely lease or privilege and subject to provisions of Article I, Section 2 of the Constitution of the State of Ohio	9
Appendix	11

Table of Cases: Page

Buckingham vs. Smith, 10 Ohio 297 8
Cleveland, etc., Railroad Co. vs. Ohio ex rel., 85 O. S. 251. 3
Cooper vs. Williams, 4 Ohio 253 8
Fox vs. Cincinnati, 104 U. S. 783 9
Hubbard vs. Toledo, 21 O. S. 379 ..... 2, 9
Kaukauna Co. vs. Green Bay, etc., Canal, 142 U. S. 255. 8
Maumee Valley Electric Co. vs. Toledo, 13 Fed. (2d) 98 ..... 6, 7
Malone vs. Toledo, 34 O. S. 541 8
State ex rel. vs. Middletown Hydraulic Company, 114 O. S. 437 ..... 4, 8
State ex rel. vs. Middletown Hydraulic Company, 116 O. S. 26 2
State ex rel. Fanger vs. Board of Public Works, 42 O. S. 607 9
Walsh vs. Railway Co., 176 U. S. 474 3

Statutes:

Act of February 4, 1825—23 Ohio Laws 50 ..... 8, 9
Act of March 23, 1840—38 Ohio Laws 87 ..... 2, 3, 9
Act of 1898 4
Act of April 9, 1902—95 Ohio Laws 118-120 4
Act of January 22, 1920—108 Ohio Laws, Part 2, 1138 et seq. 6, 7
Act of March 27, 1925 6
Act of May 11, 1927—112 Ohio Laws 360-363 ..... 4, 5, 7
Constitution of Ohio, Art. I, Sec. 2 ..... 9, 11

IN THE

Supreme Court of the United States

No. 674

October Term, 1928

HARRY J. KIRK, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, SUCCESSOR TO AND SUBSTITUTED FOR GEORGE F. SCHLESINGER, AS SUPERINTENDENT OF PUBLIC WORKS AND DIRECTOR OF THE DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS OF THE STATE OF OHIO, AND ROY E. DAVIS, RALPH E. FARNSWORTH AND GEORGE R. HOFFMAN, AS COUNTY COMMISSIONERS OF LUCAS COUNTY, OHIO; THE VILLAGE OF MAUMEE, OHIO; THE VILLAGE OF WATERVILLE, OHIO; AND THE CITY OF TOLEDO, OHIO,

Appellants,

vs.

THE MAUMEE VALLEY ELECTRIC COMPANY,

Appellee.

On Appeal from the District Court of the United States, Southern District of Ohio, Eastern Division

REPLY BRIEF ON BEHALF OF APPELLANTS

As to the claim of appellee to rights based upon a renewal of the leases as the result of its application for

renewal (Exhibit 19, Rec. 140), we call attention to the authorities cited by counsel which are cases in which the lessee had an absolute right to a renewal. The respective rights of renewal of appellee, as provided for in Exhibits 1, 3, 4, 5 and 6, are optional in that after determining the amount bid by the highest bidder, the appellee would have the option to a renewal if it would agree to pay the amount bid by the highest bidder. Application for renewal (Exhibit 19) claimed a right to a renewal of the Law supplemental lease (Exhibit 2). This supplemental lease was not entitled to a renewal, as has been shown; therefore, the superintendent of public works had a right to disregard the application for renewal. But even though he had no such right to disregard the application for renewal, steps were required by him to be taken before such renewal became effective. Therefore, if appellee felt that it had any right to obtain a renewal of any of the leases, it had its remedy in court to compel the superintendent of public works to take such steps as would entitle it to such a renewal. Counsel for appellee in their brief suggest that the Law supplemental lease (Exhibit 2) was to run contemporaneously with the Law lease (Exhibit 1); it does not so state, but on the contrary by paragraph 9 (Rec. 76) it expires on March 12, 1925.

Counsel for appellee cite many authorities in their attempt to show that this court ought not to follow the decisions of the state court in the *Hubbard* and other like cases, but that this court should determine the interpretation of the Act of March 23, 1840, and of the leases under which appellee is claiming. But this court has already determined the law to be in accordance with

that established by the Supreme Court of Ohio. Counsel seem to be unmindful of the opinion of this court in *Walsh vs. Railway Company*, 176 U. S. 474, in which it was said, with reference to the decisions of the Supreme Court of Ohio above referred to:

> "Were the question one of doubt, we should hesitate long before refusing to defer to the many opinions of the Supreme Court of Ohio, through several changes in its personnel, holding it to be within the power of the state to abandon the canal for other public purposes, and that such abandonment gave no right of action to private parties incidentally affected or damnified by it."

Counsel for appellee cite the case of *Cleveland, etc., Railroad Company vs. Ohio ex rel.*, 85 O. S. 251, as the basis for their claim that the state was acting in a proprietary capacity at the time of the making of appellee's leases. The facts in that case show that the canal had been abandoned, and the state, owning a fee simple title to the land, conveyed the same to the City of Cleveland. This conveyance was pursuant to an Act of the legislature authorizing the same. Here we have certain leases which were made while the canal was being devoted to a public purpose. These leases were made in pursuance of the Act of March 23, 1840, the terms of which are a part of the leases, and the subject matter of the leases is water power which the state is taking under its sovereign power, and which is now being devoted to a private use.

Counsel for appellee approach their argument in this case as though the state had denied the validity of the agreements of lease upon which appellee relies. Such, however, is not the case. These agreements in the

absence of an abandonment of the canal would have been enforceable.

The decision of the Supreme Court of Ohio in the *Middletown* case, 114 O. S. 437, involved the question as to the extent and nature of the conveyance from Enoch to the state; the portion of the canal involved had not been abandoned. It was held that any use by the state in taking only a part of the water which flowed with Enoch's rights, confirmed the claim that Enoch had reserved to himself a part of his water rights which were not conveyed to the state. This is further confirmed by the decision of the case on its merits. 116 O. S. 26. There had been no abandonment of the canal by the legislature; this is an important distinction from the case at bar. Other points of difference between the *Middletown* case and the case at bar, as we have heretofore pointed out, we need not restate.

Counsel for appellee say that the Acts of 1898 and 1902 recognized the rights of the appellee under its leases and seem to argue therefrom that appellee thereby obtained greater rights than called for in the respective leases. We see nothing in either of these Acts which would extend the rights or privileges granted under the leases of appellee. Until the abandonment of the canal by the Act of May 11, 1927, the leases were valid; no claim was ever made that they were not valid leases. A recognition of their validity would not enlarge their grant.

It is argued that Section 3 of the Act of April 9, 1902, shows a different public policy as to the Ohio Canal from the one determined by Section 1 as to the Miami and Erie Canal. It seems to us that this section

implies a question in the minds of the legislature as to the advisability of continuing the Ohio Canal as a public canal, and for that reason authorized an investigation to be made as to that canal, but the legislature seemed to be clearly of the opinion, without any investigation, that it was advisable to continue as a canal the Miami and Erie Canal. Section 4 of the Act, which provides for a revision of rates, could not have applied to any of appellee's leases which were then in effect. How a revision of rates would have enlarged or changed the provisions of any grant is not apparent. This Act in no way modified, changed or enlarged the powers of the board of canal commissioners or the board of public works, nor of the successor to its duties, the superintendent of public works.

Much has been said about provisions of certain of the leases which provide for payment of certain expenses by lessees, thus relieving the state from liability therefor. But there are expenses of the state well recognized, which are not assumed and not taken care of. The expenses as to the bridges shown to exist by the Act of May 11, 1927, are items which are not assumed by any of the appellee's leases, besides, as the Law supplemental lease has now expired, other expenses of the state in the maintenance of the canal must also be considered as having influenced the legislature to abandon the canal. When one considers that the state received from the City of Toledo $300,000.00 for the canal lands from Maumee to Toledo, which at normal rates of interest would realize to the state at least twice as much as it was getting out of its water leases located on the canal from Providence to Toledo, an added consideration is

apparent for the desire of the state to eliminate the canal. Other reasons for abandonment are also apparent, namely, to eliminate nuisances which would have an effect upon public comfort and health, to eliminate the danger where the canal borders on present public highways, and many other considerations of like character. Besides, it is apparent that the canal bed will furnish a most excellent right of way for highway communication required by increased traffic.

Counsel for appellee argue that the Acts of January 22, 1920, and March 27, 1925, have the effect of a ratification by the state of the agreements of lease of appellee. These agreements of lease were at that time valid leases. There was no question as to the authority of the officers of the state in their execution; therefore, nothing was accomplished by the so-called ratification. But they were not ratified; they were simply recognized as valid agreements. There was no attempt by said Acts to enlarge the provisions of said agreements, and any agreements thereafter made between the officers of the state and appellee in relation thereto. The agreements after the passage of said Acts were subject to the same interpretation as they were prior to the passage thereof, namely, that they were subject to cancellation by the state upon abandonment of the canal without any liability on the part of the state to the holders thereof.

It is argued that by virtue of the Act of January 22, 1920, as interpreted by the decision of the Circuit Court of Appeals in the case of *Maumee Valley Electric Company vs. Toledo*, 13 Fed. (2d) 98, there was an agreement by which the state had promised a court to protect the rights and interests of appellee under its

leases. As we have pointed out in our main brief, such was not the agreement, but if we accept the argument of counsel that for any such agreement to be valid it must be shown that there was some obligation on the part of the state to the lessees, then appellee's claim must fail for there is no such obligation on the part of the state. The decision of Knappen, C. J., in 13 Fed. (2d), *supra*, does not hold that there was an obligation on the part of the state toward the appellee, but holds that the state had a right to require compensation to be made by the city if the city should drain the water from the canal pursuant to the Act of January 22, 1920. It is argued that the state had some moral obligation to the appellee. We fail to see any reason for a moral obligation. The appellee took its leases with full knowledge of the meaning thereof as interpreted by the Supreme Court of Ohio and this court in numerous decisions. If pursuant to the Act of May 11, 1927, the water is drained from Lineal Part Two, it will be by the State of Ohio. The fact that appellee has no remedy in that event entitles it to no sympathy, certainly to no equity, for it knew when it took its leases that whenever the state desired to abandon the canal it could do so without liability to the holders of water leases. The fact that the legislature sought to require the City of Toledo, as between it and the holders of leases, to pay compensation, is quite different from attempting to rest an obligation on the state to pay compensation. The rights on the part of appellee spring from the agreements, which are subject to the interpretation that the state is not liable on account of the abandonment of the canal.

It is argued that in view of Section 8 of the Act of 1825, the appellee acquired by its leases some special property or title in the water. The case of *Malone vs. Toledo*, 34 O. S. 541, does not hold that the state acquired fee simple title to the water; in fact, the decisions of the Supreme Court of Ohio in the case of *Cooper vs. Williams*, 4 Ohio 253, and in the case of *Buckingham vs. Smith*, 10 Ohio 297, expressly hold that water cannot be acquired in fee simple. We do not understand the decisions to hold that the state acquired a fee simple title in flowing waters; in fact, we think the early Ohio decisions cited in our main brief are to the contrary.

The conclusion urged by counsel for appellee, that in acquiring waters the state was not expressly prohibited from using them for purposes other than navigation, was not and could not have been for consideration in the *Middletown* case, because the state in that case was not attempting to use water acquired by it for purposes other than navigation. The water which Enoch and his successors in title were using belonged to Enoch by right of use. This is all that was held in the *Middletown* case. This is distinguished from the claim of appellee that the state had the right to use the water for purposes other than navigation. We think it is clearly decided by the earlier Ohio cases cited in our main brief, as well as the general law on the subject, including the decision of this court in the case of *Kaukauna Company vs. Green Bay, etc., Canal*, 142 U. S. 255, that such right obtains only for a public purpose.

Let us suppose that the agreements of lease in the case at bar had expressly provided that in case of a termination of these leases the state would compensate

the lessees for their losses sustained. Such an agreement, we think, would be clearly invalid because the board of public works was not authorized by the Act of March 23, 1840, to make such an agreement. *State ex rel. Fanger vs. Board of Public Works*, 42 O. S. 607. In paragraph 3 of the syllabus it is held:

> "Hence, a clause providing that on such resumption of surplus water and termination of the lease, the board of public works shall pay to the lessee the value of the lasting improvements erected for the use of such water, is a restriction on the performance of a public duty, and is unauthorized and void."

Notwithstanding this express ruling, it is sought here to engraft an implied liability on the part of the state where an express agreement would be invalid. In that case there was a resumption of water by the board of public works. The results of abandonment are identical with the results of resumption, as is shown by the *Hubbard* and other kindred cases.

Fox vs. Cincinnati, 104 U. S. 783-785.

As is shown by the *Hubbard* and other kindred cases, the right which the appellee has under its respective leases is merely a license or a privilege to take water from the canal; the state is under no obligation or agreement to furnish water under said leases. Sections 5 and 6 of the Act of February 4, 1825, and Section 23 of the Act of March 23, 1840, refer in terms to a "privilege" to the use of the water. In each of the leases the so-called rights are termed "privileges" (as to the Law lease, Exhibit 1, Rec. 71; as to the Studer lease, Exhibit 3, Rec. 79; as to the Tryon lease, Exhibit 4, Rec. 83 and

86; as to the Maumee Paper Company lease, Exhibit 5, Rec. 89 and 90; as to the Detwiler lease, Exhibit 6, Rec. 99). This privilege, as is held in the cases above referred to, is subject to the right of the state to revoke; but in Ohio the state has an additional right by virtue of Section 2 of Article I of the Constitution of the State of Ohio, by which it is provided that no special privileges or immunities shall be granted that may not be altered, revoked, or repealed by the General Assembly (Appendix p. 11). This section was adopted in this form in 1851, and therefore applies to privileges granted to the appellee.

Respectfully submitted,

GILBERT BETTMAN,
Attorney General of Ohio,

L. F. LAYLIN,
JOSEPH A. GOLDOWN,
Solicitors for Harry J. Kirk.

LEROY W. HUNT,
Prosecuting Attorney, Lucas County,
Solicitor for Lucas County Commissioners.

GEORGE W. RITTER,
Director of Law of Toledo, Ohio,

MARTIN S. DODD,
DUDLEY F. SMITH,
Solicitors for the City of Toledo.

GEORGE W. RITTER,
Solicitor for the Villages of Maumee and Waterville, Ohio.

APPENDIX

The Constitution of the State of Ohio:

"Article I.

Section 2. Right to alter, reform, or abolish government, and repeal special privileges. All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly."